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Affirmed—

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 221.

THE CITY OF ST. LOUIS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 12, 1874.

Miller J.

SUPREME COURT OF THE UNITED STATES.

No. 221.

THE CITY OF ST. LOUIS, APPELLANT,

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1 In the Court of Claims.

THE CITY OF CARONDELET } 1813.
vs.
THE UNITED STATES. }

Original petition.—Filed Sept. 6, 1859.

To the Court of Claims:

Your petitioner, the city of Carondelet, of the State of Missouri, respectfully shows that a tract of land, situated in the county of St. Louis, within said State, known as the commons of Carondelet, and shown in the copy of the official survey, herewith filed, marked "C," was granted by the Spanish government to the inhabitants of the village of Carondelet, and the Government of the United States, as part of the consideration for the session of the territory in which this land lies by the government of France, stipulated in the 3d article of the treaty of 1803 that the inhabitants "shall be maintained and protected in the free enjoyment of their liberty, property, and in the religion which they profess;" that, in pursuance of said treaty stipulation, a series of acts have been passed by Congress to assure said inhabitants in their lands, and among others the act entitled "An act to make further provision for settling claims to land in the Territory of Missouri," approved June 13, 1812, by the first section of which the commons of Carondelet were confirmed to the inhabitants of said village; and in order to determine the extent and boundaries of the tract so granted or confirmed, it was made the duty of the principal deputy surveyor for said Territory to survey or cause to be surveyed

2 and marked the out-boundary lines of said commons; that, in pursuance of this act, a survey of said tract was made in 1817 by Elias Rector, which was retraced by Joseph C. Brown, in the year 1834, by the direction of the surveyor-general of the United States for Illinois and Missouri, for the purpose of connecting it with the adjoining surveys; that after the land had been thus set apart to the inhabitants of Carondelet by the officer designated by law for that purpose, application was made to some of said inhabitants, on behalf of the War Department, to grant a portion of said tract to the United States for military purposes, and seventeen of said inhabitants accordingly made a deed to the United States, dated July 8th, 1826, by which about twelve hundred acres of said commons was granted to the United States, "so long as it may be found useful for military purposes," and under that deed the United States took possession of the same and established the military post known as Jefferson Barracks; that the inhabitants of said village obtained a municipal incorporation in the year 1832, and the municipal authorities of the village afterwards denied the right of the seventeen individuals who had assumed to grant the land to the United States to make such grant, and in the year 1838 made known to General Atkinson, then commanding the post, that the tract embraced in it had been entered upon unlawfully by the United States, and Arthur L. Magenis, then attorney of the United States for the Missouri district, decided that the said deed under which the United States had entered upon said land was inoperative; that the Secretary of War, on learning these facts, determined to deny the title of the inhabitants which had been recognised by his department when the said tract was entered upon, and to obtain the land by the action of the executive Government,

of which he was one of the chiefs, and for this purpose made known to the Commissioner of the General Land-Office, on the 22d June, 1839, the necessity of annulling the survey of the commons of Carondelet in order to save Jefferson Barracks; that the Commissioner, thus improperly influenced, erroneously decided, on the 20th of January, 1841, that the said inhabitants had no legal title to the commons, but had an equitable claim to so much of it as lay to the north of the rivere Des Perès, which Congress would probably confirm, and illegally directed the surveyor-general to lay off the land within the survey of the commons lying south of said rivere Des Perès as public land to be sold, except the barracks tract recently surveyed by order of the War Department, supposed to contain seventeen hundred and two acres, but which in fact contained about two thousand acres, which was ordered to be reserved for military purposes; that this decision was never carried into effect by the surveyor-general, and was reversed and rescinded by Commissioner Shields in 1845, who declared "it inexpedient to interfere in any manner with the survey of that common as originally made by Elias Rector in 1817, and retraced by Brown in 1834," and this decision was adhered to by Acting Commissioner Piper and by Commissioner Young; and on the 4th of March, 1852, Commissioner Wilson again refused to disturb it; that on the 25th of July, 1853, Mr. Stuart, then Secretary of the Interior, reversed this decision, and rendered a decision
3 adverse to the survey; that to put an end to the vexation, harassment, litigation, and disturbance of their whole possession, occasioned to the inhabitants of Carondelet and those holding under them by the illegal annulment of said survey, which had been procured by the Secretary of War to secure the said barracks tract to the United States, the authorities of the city of Carondelet were constrained to make a deed to the United States for the barracks tract, and on the day of , 1854, such a deed was executed by them upon no other consideration, and transmitted to the War Department; that the Secretary of War, on the 12th day of January, 1855, informed Mr. McClelland, then Secretary of the Interior, that the said deed had been received and was satisfactory, and that no further objections would be interposed by the War Department to the re-establishment of said survey, and the Secretary of the Interior thereupon accordingly, on the 23d day of February, 1855, ordered that the said survey should be re-established, and reserved to the United States the said barracks tract. And your petitioner alleges that such reservation is illegal and void, and that the deed from said city to the United States is the only obstacle to the recovery of the land by the city of Carondelet in the ordinary courts of law; that the said proceedings on the part of the said executive officers of the Government intended to secure to the Government the said tract of land and the buildings which had been improvidently erected thereon by its officers and agents, which induced the execution and delivery of said deed, were illegal, unjust, and oppressive, and coerced the execution and delivery of said deed, and that in equity and good conscience said deed should be set aside and declared void, and said land ordered to be restored to said city, to which alone your petitioner avers the same equitably and rightfully belongs; and your petitioner therefore prays that a bill may be reported to Congress by this court directing the said barracks tract to be restored to the said city; and will ever pray.

BERNARD POEPPING,
Mayor of the City of Carondelet.

STATE OF MISSOURI,
County of St. Louis, ss:

Bernard Poepping, mayor of the city of Carondelet, being duly sworn, saith that the facts stated in the foregoing petition on behalf of said city he verily believes to be true.

BERNARD POEPPING.

Sworn to and subscribed before me this 29th day of August, A. D. 1859.

THOMAS W. LEVANT,
Justice of the Peace.

4 In the Court of Claims.

THE CITY OF CARONDELET } 1813.
vs.
THE UNITED STATES. }

And the said city of Carondelet, a body corporate and politic, established by the laws of the State of Missouri, for amendatory and supplemental petition in the above cause, says that said city, and the inhabitants and citizens thereof, have at all times borne true allegiance to the Government of the United States; that they have not in any way, voluntarily, aided and abetted or given encouragement to rebellion against the said Government.

And in addition to the relief asked for by said city, she, the said city, also asks for such other, further, and general relief in the prem-
5 ises as she may be lawfully entitled to.

BERNARD POEPPING,
Mayor of the City of Carondelet.

DISTRICT OF MISSOURI, ST. LOUIS,
July 25th, 1863.

Before me, a commissioner of the Court of Claims in and for the State of Missouri, came, on the 25th day of July, 1863, Bernard Poepping, mayor of the city of Carondelet, who, being duly sworn, on his oath deposes and says, that no assignment or transfer of the claim mentioned in the above cause, or any part thereof, or any interest therein, has been made; that said city is justly entitled to the amount and the land therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in the original petition in said cause and in this supplemental and amendatory petition are true.

BERNARD POEPPING,
Mayor of the City of Carondelet.

[Cancelled revenue stamp.]

6 Sworn to and subscribed before me, said commissioner, on this 25th day of July, A. D. 1863.

In witness whereof I hereto set my hand and affix my official seal the date aforesaid.

[SEAL.] JOSIAH G. McCLELLAN,
Commr. for Court of Claims for Missouri.

o
as Filed July 31, 1863.

7 U. S. Court of Claims.

THE CITY OF CARONDELET }
vs.
THE UNITED STATES. }

To the Court of Claims:

Your petitioner, the city of Carondelet, of the State of Missouri, respectfully shows, that a tract of land, situated in the county of St. Louis, within said State, known as the commons of Carondelet, and shown in the copy of the official survey, herewith filed, marked "C," was granted by the Spanish government to the inhabitants of the village of Carondelet, and the Government of the United State, as part of the consideration for the cession of the territory in which this land lies by the government of France, stipulated, in the 3d article of the treaty of 1803, that the inhabitants "shall be maintained and protected in the free enjoyment of their liberty, property, and in the religion which they profess."

That, in pursuance of said treaty stipulation, a series of acts have been passed by Congress to assure said inhabitants in their lands, and among others the act entitled "An act to make further provision for settling claims to land in the Territory of Missouri," approved June 13th, 1812, by the first section of which the commons of Carondelet were confirmed to the inhabitants of said village. And in order to determine the extent and boundaries of the tract so granted or confirmed, it was made the duty of the principal deputy surveyor for said Territory to survey, or cause to be surveyed and marked, the outboundary lines of said commons.

8 That, in pursuance of this act, a survey of said tract was made in 1817 by Elias Rector, which was retraced by Joseph C. Brown in the year 1834, by the direction of the surveyor-general of the United States for Illinois and Missouri, for the purpose of connecting it with the adjoining surveys.

That after the land had been thus set apart to the inhabitants of Carondelet by the officer designated by law for that purpose, application was made to some of said inhabitants, on behalf of the War Department, to grant a portion of said tract to the United States for military purposes, and seventeen of said inhabitants accordingly made a deed to the United States, dated July 8th, 1826, by which about twelve hundred acres of said commons was granted to the United States, "so long as it may be found useful for military purposes," and under that deed the United States took possession of the same, and established the military post known as Jefferson Barracks.

That the inhabitants of said village obtained a municipal incorporation in the year 1832, and the municipal authorities of the village afterwards denied the right of the seventeen individuals who had assumed to grant the land to the United States to make such grant, and in the year 1838 made known to General Atkinson, then commanding the post, that the tract embraced in it had been entered upon unlawfully by the United States, and Arthur L. Magenis, then attorney of the United States for the Missouri district, decided that the said deed under which the United States had entered upon said land was inoperative.

That the Secretary of War, on learning these facts, Determined to deny the title of the inhabitants, which had been recognized by his Department when the said tract was entered upon, and to obtain the la

by the action of the executive government, of which he was one
9 of the chiefs, and for this purpose made known to the Comissioner of the General Land-Office, on the 22d June, 1839, the necessity of annulling the survey of the commons of Carondelet, in order to save Jefferson Barracks.

That the Commissioner, thus improperly influenced, erroneously decided, on the 20th of January, 1841, that the said inhabitants had no legal title to the commons, but had an equitable claim to so much of it as lay to the north of the river Des Pères, which Congress would probably confirm, and illegally directed the surveyor-general to lay off the land within the survey of the commons, lying south of said river Des Pères, as public land, to be sold, except the barracks-tract, recently surveyed by order of the War Department, supposed to contain seventeen hundred and two acres, but which in fact contained about two thousand acres, which was ordered to be reserved for military purposes.

That this decision was never carried into effect by the surveyor-general, and was reversed and rescinded by Commissioner Shields in 1845, who declared "it inexpedient to interfere in any manner which the survey of that common as originally made by Elias Rector in 1817, and retraced by Brown in 1834," and this decision was adhered to by Acting Commissioner Piper, and by Commissioner Young; and on the 4th of March, 1852, Commissioner Wilson again refused to disturb it.

That on the 25th of July, 1853, Mr. Stuart, then Secretary of the Interior, reversed this decision and rendered a decision adverse to the survey.

That in the year 1854 it was urged upon the corporate authorities of Carondelet, by Willis L. Williams, attorney for Sigerson, who claimed a part of the common under Carondelet, that it was essential for all concerned in the commons title south of the Des Pères, in order to procure a re-establishment of the survey thereof, that they must remove the objections thereto of the Secretary of War, who opposed the sur-
10 vey on account of the barracks-tract, and whose influence with the Secretary of the Interior, as to the title of that tract, was sufficient to decide the question whether or not the survey should be re-established.

Upon these representations the city council, in 1854, authorized the mayor to make a cession of the land embraced in the barracks tract, and the mayor did execute a deed for such tract for the nominal sum of five dollars.

That said expressed consideration was a mere pretence, and the only consideration for such deed was the procurement of the survey.

The Secretary of the Interior, McClelland, withheld his decision on the survey until he was informed by the Secretary of War that such deed had been obtained from Carondelet, after learning which, by communication of the Secretary of War, dated 12th of January, 1855, he, the Secretary of the Interior, did, on the 23d of February, 1855, give his official decision re-establishing Brown's and Rector's survey, but expressing that the barracks tract was reserved or excepted from said common.

That from the year 1817 to 1839, over twenty-two years, these official surveys remained amongst the public surveys in the surveyor-general's office, as well-known and frequently recognized muniments of title, made officially and in performance of duties required by acts of Congress of 13 June, 1812, and 29th April, 1816, during which period copies of the same were given out by the Land Department, officially certified as valid existing surveys, and the authorities of Carondelet subdivided

portions of the land so designated, south of the river Des Pères, and publicly disposed of the same to bona-fide settlers; and by every character of act in common transactions said survey was treated as a final and official and authoritative designation of said common.

The survey of Brown and Rector was declared to be incorrect by Commissioner Whitcomb on the 24th September, 1839, without any
11 notification in relation thereto given to Carondelet, and was an ex-parte step. From that time for the period of about six years no decisive action was taken by the Land Department in relation to the survey, until, on 14 February, 1846, Commissioner Shields decided that Brown's survey should be held binding, excepting, however, the barracks tract.

And the Land Department held from that time that the barracks tract must be reserved out of the survey. During most of the time it was also held by the Land Department that Congress had power to make further laws affecting the title of Carondelet, and during all this time, from 1839 until 1854, the title of Carondelet was unsettled to its common.

That by the refusal of the officers of the Land Department to give accredited copies of the survey, and from their declarations against its correctness, the courts and people fell into doubts and contradictions with reference to the Carondelet title. Squatters and speculators entered upon the land, some of them taking steps to enter parts of it as public land. Trespassers could not be successfully resisted.

In addition to these serious and protracted difficulties and losses by the construction of the Land Department, serious doubts were created as to the title of the entire commons; and yet the removal of all these doubts and the end of these losses, vexatious disputes, and suits was represented and believed to be within the power of the Secretary of War, and his decision was inflexibly to contend for the barracks tract until he should wear out the endurance of Carondelet.

That to put an end to the vexation, harrassment, litigation, and disturbance of their whole possession, the authorities of Carondelet were thus constrained to make the deed dated 25th of October, 1854.

And your petitioner charges that said deed is null and void, in consequence of the absence of any consideration given therefor, and
12 the illegal and unwarranted acts and conduct of the officers of the Government in order to procure the same; and that as it appears that the United States has obtained the form of a conveyance of the title of Carondelet to the barracks tract, through the acts of its officers, not authorized by law or custom or usage of the Government, and which were oppressive and contrary to equity and good faith and fair dealing, your petitioner prays that a decree and judgment shall be rendered that the United States shall pay to your petitioner the full value of said land, being about two thousand acres, the exact quantity being designated in the official survey of the said barracks tract and commons on file as an exhibit in this case; which value is about three hundred dollars an acre, exclusive of the value of the improvements; and your petitioner prays for such other relief as it may be entitled to in the premises. Your petitioner has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said Government.

MONTGOMERY BLAIR,
F. A. DICK,
Solicitors for Petitioner.

STATE OF MISSOURI,
County of St. Louis:

Before the undersigned, A. L. Bergfield, a notary public in and for said county and State, duly commissioned & qualified, came Bernard Poepping, mayor of the city of Carondelet, the claimant in the foregoing petition, who, being duly sworn according to law, states on oath that no assignment or transfer of the claim stated in said petition, or any part thereof, or any interest therein, has been made except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

13 In the Court of Claims.

At a Court of Claims held at the Capitol, in the city of Washington, February 14, 1874.

CITY OF CARONDELET
vs.
THE UNITED STATES. } 1813.

It appearing to the court that by an act of the general assembly of the State of Missouri entitled "An act providing for the merging of the city of Carondelet into the city of St. Louis, and in relation to the public schools therein," approved March 4, 1870, all commons and all other property, real, personal, and mixed, and all rights in action which were at the date of said act owned and held by the city of Carondelet, should be and by said act were transferred and conveyed to and vested
14 in the said city of St. Louis as fully and completely in every respect whatever as the general assembly of said State had the power to do, so that the said city of St. Louis should thereafter own, have, and hold said commons and all other property, real, personal, and mixed, and rights in action, as fully and completely in every respect whatever as the said city of Carondelet at the date of said act owned and held the same; and it appearing also that by said act it was declared that the corporation of the said city of Carondelet should be, and thereby was, abolished and terminated and should never thereafter exist, it is, therefore, on motion of the attorneys for the claimant herein, ordered that the said city of St. Louis be substituted as claimant in this suit for the said city of Carondelet and be allowed to prosecute the same for its own benefit.

By the court.

15 In the Court of Claims.

CITY OF SAINT LOUIS
vs.
THE UNITED STATES. } 1813.

At a Court of Claims, held at the Capitol, in the city of Washington, the fifteenth day of May, A. D. 1874, judgment was orded to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the

defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

A true copy of record.

16 In the Court of Claims, Dec. term, 1873.

THE CITY OF ST. LOUIS
vs.
THE UNITED STATES. } 1813.

From the judgment rendered in the above-entitled cause on this 15th day of May, 1874, the claimant, by its attorneys, on this the said day makes application for and gives notice of an appeal to the Supreme Court of the United States.

MONTGOMERY BLAIR,
FRANKLIN A. DICK,
For the Clmt.

Filed May 15, 1874.

Ordered, that the appeal be allowed as prayed for.
By the court.

17 United States Court of Claims.

CITY OF SAINT LOUIS
vs.
THE UNITED STATES.

Finding of facts.

In this case, upon the evidence, the court finds the facts to be as follows:

§ 1. On the 6th day of December, 1796, Jean B. Gamache presented to Don Zenon Trudeau, lieutenant-governor of the western part of Illinois, in the then Spanish province of Upper Louisiana, a petition praying a grant of land to him in the vicinity of the village of Carondelet; and he designated the land which he prayed for "as the continuation of the lands, (common-fields,) taking for his limits the limit of Mr. Constant, thence to the Mississippi and the river Des Pères for limit, coming to the village of Carondelet."

The exact position of the land thus sought by said Gamache does not appear; but it was north of the river Des Pères, a small stream running eastwardly, and emptying into the Mississippi River about one mile and a quarter south of the southern end of the village of Carondelet, as it existed in 1803.

§ 2. On the 7th of December, 1796, Lieutenant-Governor Trudeau indorsed on said petition the words following:

"The land demanded is within the limits of land reserved for the purpose of furnishing wood necessary for the use of the village of Carondelet, and the demand which is made by Mr. Gamache cannot take place, nor any other concession be granted in the direction of a line taken from the end of the field-lots of the village and running parallel with the Mississippi, farther down said river one hundred and fifty arpents."

§ 3. On the 25th of December, 1797, Antoine Soulard made the following certificate:

"We, the undersigned, a surveyor commissioned by the government, do certify to all to whom it shall appertain, that on this 21st of December, in virtue of an order transmitted by the lieutenant-governor to Mr. De Treget, captain-commandant of the said village, enjoining upon the inhabitants to make known the line of a tract of land which was conceded to them on the 7th of December, 1796, which line must be parallel with those of Mr. Anto. Reihle and Alvarez. The said inhabitants, in presence of their commandant, have agreed upon causing their line to be drawn from the last bound placed at the extremity of the depth of their lands, which had formerly been surveyed by Mr. Pre. Chouteau, in virtue of an order from the lieutenant-governor. Having taken the bearing course of these same lands, I found that they ran south 28° west. I followed this same course 23 arpents 3½ poles, at which distance I intersected the river Des Pères. The end of the line on the bank of the same river has been bounded with a stone, having for witness two flint-
18 stones and one flattened lead bullet. The land of Mr. Alvarez must be distant from the said stone bound 24 feet in following the same line parallel. And in order that the said inhabitants may prove the same, I have delivered the presents.

"Saint Louis, of Illinois, the 25th of December, 1797.

"ANTO. SOULARD."

§ 4. On the 18th of February, 1806, the same Antoine Soulard, styling himself surveyor-general of the Territory of Louisiana, gave the following certificate:

"I do certify, wherever it may be needful, that the inhabitants of the village of Carondelet have requested me to measure or cause to be measured by one of my deputies, in their behalf, a portion of land which was granted to them as a common by the lieutenant-governor, Don Zenon Trudeau. This land was to be surveyed by Mr. Bartholomew Cousin, who transported himself to the village of Carondelet for that purpose. But at the moment he would set his instrument he found it out of order and no use to him—an inconvenience which did prevent the said survey to be then made; and the short space of time that was left to attend to it again has hindered me from being able to satisfy to the calls made on me by the citizens of the settlement of Carondelet. In faith whereof I have delivered the presents to the interested, that they may serve the same wherever needed.

"Saint Louis, 18th February, 1806.

"ANTOINE SOULARD,
"*Surveyor-General Territory Louisiana.*"

§ 5. On the 7th of June, 1808, Baptiste Lajoye and Louis Menard, on the part of the inhabitants of the village of Carondelet, gave notice to the recorder of land-titles for the Territory of Louisiana that said inhabitants "claimed title to 6,000 arpents of land, situated adjoining said village, by virtue of a concession from Don Zenon Trudeau, lieutenant-governor of Upper Louisiana, dated the 7th of December, 1796."

As evidence of the alleged concession, they filed the aforesaid petition of Jean B. Gamache and the indorsement thereon made by said Trudeau.

§ 6. The said claim was rejected by the board of commissioners organized under the act of March 3, 1807, "respecting claims to land in the Territories of Orleans and Louisiana."

§ 7. In the year 1816 William Rector was surveyor of public lands in the Territories of Illinois and Missouri, appointed under the act of April 29, 1816, (3 Stat. L., 326, chap. 151,) and Elias Rector was a deputy surveyor under him.

§ 8. In that year the said Elias Rector made a survey purporting to be of the out-boundary lines of the Carondelet commons; the field-notes of which survey, signed "E. R.," were deposited in the office of the said surveyor of public lands. It does not appear that said survey was made under the orders of said surveyor, William Rector; nor that it was ever approved by him, or by any of his successors in office; nor that any plat thereof accompanied said field-notes; nor that any official use was ever made of those notes by any officer of the Government, until Joseph C. Brown was required to retrace the lines of the Carondelet commons in the year 1834, as hereinafter found. But it does appear that, on the 23d of April, 1829, Charles Biddle, who had previously applied to William McCree, then surveyor general for Illinois and Missouri, for a survey of a tract of land which said Biddle had located under a New Madrid certificate, intended, owing to doubts entertained
19 by said McCree in relation thereto, to submit the matter to the Commissioner of the General Land-Office, and, with a view thereto, requested said McCree to inform him whether there were any documents officially known to him which showed that any claim for commons had ever been made by the people of Carondelet; and, if so, whether any limits to their claims had ever been designated; and whether said McCree had any other official knowledge on the subject, except what was contained in the act of Congress passed the 13th of June, 1812. The said McCree, on the 25th of April, 1829, answered the inquiries of said Biddle in the following words:

"In reply to these inquiries, I have to state that the only information possessed by this office and on file at the date of your letter concerning the Carondelet commons, was the law of the 13th of June, 1812, which confirms them as claimed, and a statement in the 'Register d'Arpentage,' from which it appears that, by virtue of an order from the lieutenant-governor, a line had been run from the southwest corner of their lands 23 arpents 3¼ poles to the river Des Pères on course south 28° west, parallel to the southeast boundary-line of the claim of Alvarez, and distance from it 24 feet. This line purports to be a boundary to grounds conceded to the inhabitants of Carondelet on the 7th of December, 1796, and is, therefore, an intimation (however indefinite) of their claim in common, in lands beyond and south of their village and common-field lots.

"During the conversation I had with you and General Ashley on the subject of the New Madrid certificate, (No. 338,) I took it for granted that the location made under that certificate was within the reputed limits of the Carondelet commons; in which case I was (and still am) of the opinion that I could not with propriety cause it to be surveyed; for if there were any facts or any information whatever concerning those commons which might enable me to determine their boundaries, &c., as claimed before the board of commissioners, and which were of record in the recorder's office, they constituted, in the contemplation of the law, a part of the official information within my reach, and therefore virtually in the possession of this office.

"On the receipt of your letter of the 23d instant, I addressed a note to the recorder of land-titles, requesting him to furnish me with such extracts from the records of his office in relation to the Carondelet commons as might enable me to ascertain their extent, boundaries, &c.,

and in answer to that application I have received from him some extracts from the proceedings of the board of commissioners, a copy of which is herewith inclosed for your information.

"Permit me to call your attention to the declaration of the lieutenant-governor, Zenon Trudeau, (which you will find among the extracts,) on the petition of Jean Baptiste Gamache for a tract of land, which petition is refused for the express reason that the land requested 'is comprised in that which has been reserved to furnish the wood necessary to the village of Carondelet;' and the lieutenant-governor goes on further to say that the demand 'ne peut avoir lieu, ainsi que toutes concessions accordée dans la direction de la ligne prise au bout des terres du dit village et courant parallellement du Mississippi cent cinquante arpens plus bas.'

"Now, a line running from the southwest corner of the common-fields 150 arpents, or, rather, the line which had been run from the southwest corner of the common-fields to the river Des Pères, if extended to 150 arpents in a direction parallel to the Mississippi River, will include the greater part of the tract located under the New Madrid certificate No. 338.

"The original merits of the claim to commons set up by the inhabitants of Carondelet, the validity of the evidence, or genuineness of the documents adduced by them before the board of commissioners in support of their pretensions, were no doubt very proper subjects for the consideration of Congress prior to the passage of the act of 13th of June, 1812, confirming the claim; but they are, I conceive, wholly irrelevant to the only question which the law leaves in any degree to my discretion, which is simply to find out and establish the boundary-lines of the tract as claimed before the board of commissioners, provided those boundaries can be established without interfering with any prior confirmed claim."

§ 9. On the 8th of July, 1826, a deed was executed by twelve of the inhabitants of Carondelet, in the words and figures following, to wit:

"This deed, made and concluded this 8th day of July, in the year of our Lord one thousand eight hundred and twenty-six, between Samuel D. Solomon, George Shults, Anthony Barada, Anthony Motie, Yasinto Pigion, Saint Amant Michan, Louis Constant, Alexis Page, Joseph Menard, August Dulee, John B. Shults, and Dominique Huge, of the village of Carondelet, county of Saint Louis and State of Missouri, of the first part, and the United States of America, of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of five dollars to them in hand well and truly paid by Joshua B. Brant, assistant quartermaster of the United States Army, the receipt whereof is hereby acknowledged, have remised, released, and quit-claimed, and by these presents do remise, release, and quit-claim unto the party of the second part all the estate, right, title, interest, and claim and demand whatsoever of, in, and to all that certain tract, piece, or parcel of land lying and being situate in the county of Saint Louis aforesaid, butted and bounded as follows, to wit: Eastwardly by the river Mississippi, northwardly by lands of Julien Chouquette and Benjamin Patterson, sr., westwardly by the public road leading from Carondelet to Herculaneum, and southwardly in part by the southern boundary-line of the common of Carondelet and a tract of land identified on the general plat under No. 3; and whatever quantity or number of acres may be contained within the boundaries aforesaid, it being part of a large quantity which the said parties of the first part claim as common belonging to the inhabitants of the village of Carondelet.

"To have and to hold the aforesaid tract or parcel of land and premises above mentioned unto the said party of the second part so long as it may be found useful and necessary for military purposes. It is covenanted, and the true intent and meaning hereof is, or is intended so to be, that, whereas the right and title to the premises herein described is not finally decided upon, this deed is made without in any wise impairing the right and claim of either of the parties in the premises as aforesaid; and further, that as soon as the United States shall cease to use the premises aforesaid for military purposes, the same shall revert to the parties of the first part, with the same right they now have, reserving to the said United States the right of disposing of such improvements as will be deemed by them necessary to their interest and benefit.

"In witness whereof the said parties have hereunto set their hands and seals the day and date first above written."

§ 10. In the year 1826, the military authorities of the United States sent a body of troops, commanded by Brigadier-General Henry
21 Atkinson, and entered upon and took possession of a tract of land lying within the out-boundary lines of the Carondelet commons, as surveyed by said Elias Rector, and within the limits of the tract described in said deed of July 8, 1826, and erected thereon the buildings known as Jefferson Barracks; and the United States have ever since been in possession of said tract. Prior to the year 1826, there had never been any military or other post upon the land lying south of the river Des Pères, within said out-boundaries; nor does it appear that before the final decision of the Secretary of the Interior, in 1855, in regard to Brown's survey, as hereinafter set forth, there ever was any entry or notation of the survey of the Jefferson Barracks tract, upon the books of the surveyor-general's office at Saint Louis, or upon the books of the General Land-Office, as a military reservation.

§ 11. In the year 1831, the inhabitants of Carondelet petitioned the county court of Saint Louis County, Missouri, for incorporation as a town, and in their petition they used the following language: "That your petitioners labor under great inconveniences for the regulation and government of their village, and commons attached thereto, and bounded as follows: Beginning in the main channel of the Mississippi River, on the Saint Louis commons; thence bearing north 57° 59′ west to the line of the common-fields; thence south with the line of the common-fields to the river Des Pères; thence east with the river Des Pères to the main channel of the Mississippi; thence up the main channel of the Mississippi to the place of beginning."

The incorporation as a town was granted, in 1832, by said county court.

§ 12. On the first of March, 1851, the inhabitants of said town were by an act of the general assembly of the State of Missouri incorporated as a city, with the expressed power vested in the city council thereof to dispose, by ordinance, of the commons belonging to the town or village of Carondelet, in any manner said city council should deem proper.

§ 13. On the 10th of February, 1834, Elias T. Langham, surveyor-general at Saint Louis, placed in the hands of Joseph C. Brown, a deputy surveyor under him, a copy of the field-notes of Elias Rector's survey, and instructed him to retrace the lines and re-establish the corners of that survey, and connect it with adjoining public and private surveys. Under these instructions the said Brown, in March, 1834, retraced the out-boundary lines of the Carondelet commons, substantially in accordance with said Rector's field-notes; and the said Brown's survey was approved by said Langham on the 29th of July, 1834. The out-boundaries,

as surveyed by said Brown, included the lands of the Jefferson Barracks tract as possessed by the United States; but the lines of that tract were not shown on the plat of that survey.

§ 14. On the 22d of August, 1834, the recorder of land-titles in the State of Missouri issued the following certificate:

"OFFICE OF THE RECORDER OF LAND-TITLES,
"*Saint Louis, Mo.*, ,

"It is hereby certified that, under the provisions of the first section of the act of Congress approved on the 13th of June, 1812, entitled 'An act making further provisions for settling the claims to land in the Territory of Missouri,' and of the several acts of Congress supplementary or having reference thereto, approved on the 26th day of May, 1824, and the 27th day of January, 1831, the inhabitants in the village of Carondelet, in the county of Saint Louis, in this State, have been confirmed in their claim in common to six thousand arpents of land, being in townships 43 and 44 north, ranges 6 and 7 east of the 5th p. m.; the same having been reguarly surveyed, as appears by a plat and field-notes thereof returned to this office by the surveyor of the lands of the United States in the States of Illinois and Missouri, certified by him on the 29th day of July, 1834, and numbered 2965, which accompanies this certificate, and to which I refer for a more full and complete description of the land above mentioned; containing, according to said survey and certificate, nine thousand nine hundred and five acres and twenty-nine-hundredths of an acre.

"In testimony whereof I have hereunto subscribed my name this 22d day of August, A. D. 1834.

"F. R. CONWAY,
"*Recorder of Land-Titles in the State of Missouri.*"

§ 15. Up to the year 1839 no controversy arose in regard to Brown's survey, but the same was generally regarded as final, and the town of Carondelet laid out and leased lands comprised within it.

§ 16. It does not appear that prior to that year Brown's survey was known to the Commissioner of the General Land-Office. On the 18th of May, 1839, the surveyor-general at Saint Louis addressed a letter in relation to that survey to the United States attorney for the district of Missouri; the terms of which letter do not appear, but it was transmitted by the attorney to the Secretary of War, who, on the 19th of June following, wrote to the commanding officer at Jefferson Barracks, requiring him to inform the Department what quantity of land ought to be retained there for a military reservation; and, on the 22d of the same month, the Secretary addressed the following letter to the Commissioner of the General Land-Office:

"WAR DEPARTMENT, *June* 22, 1839.

"SIR: I beg leave to call your attention to the subject of the accompanying letter of the surveyor-general of Missouri, dated Saint Louis, the 18th ultimo, addressed to the United States attorney for that district relative to the Carondelet commons, and to request that you take measures to sell the land included within the lines marked with red on the accompanying plat, from the river Des Pères south, claimed as commons by the village of Carondelet, but believed to belong to the United States. The military reservation desired for the United States round the fort at

Jefferson Barracks will be designated, whenever the Land-Office is prepared to sell the residue of this tract of land.

"Very respectfully, your obedient servant,

"J. R. POINSETT.

"JAMES WHITCOMB, Esq.,
"*Commissioner General Land Office.*"

So far as appears, this letter gave to the General Land-Office the first information of Brown's survey.

§ 17. To the Secretary of War's letter of June 19, 1839, to the commanding officer at Jefferson Barracks, that officer returned the following answer:

"HEADQUARTERS FIRST DEPARTMENT,
"WESTERN DIVISION OF THE ARMY,
"*Jefferson Barracks, August* 7, 1839.

"SIR: I delayed answering your letter of the 19th of June last for the purpose of obtaining the best information in reference to the
23 claims of the inhabitants of the village of Carondelet to the commons that include the barracks at this post. On application to the surveyor-general at Saint Louis, I have been furnished with the accompanying papers marked 'A, B, and C,' which are no doubt correct representations. It seems to be the opinion of General Milburn, the surveyor-general, that the claims of the people of Carondelet are sustained by the acts of Congress of the 13th of June, 1812, and 27th of January, 1831, as expressed in his letter to me of the 1st instant, and which accompanies these papers:

"For possession, we shall have to depend upon a cession of a part of the commons made by the authorities of Carondelet, in 1826. The original grant of relinquishment is on file in the office of the Quartermaster-General, at Washington City, to which I beg leave to refer you as to our claim to the use of the grounds as long as the United States wants it for military purposes. The village, however, has been incorporated by an act of the legislature of this State since the grant was made by the authorities to the United States in 1826, and the corporate authorities now say that the authorities that acted in 1826 had no right to make the grant. Hence there is a probability of some difficulty arising as to the claim of the United States to the perpetual use of the ground, under the grant made by the authorities in 1826. There will be no difficulty, however, I think, in obtaining a confirmation of the original grant by the present authorities, if the Quartermaster's Department here were authorized to act in the case; to the propriety of which I call your attention.

"Notwithstanding the opinion of the surveyor-general as to the legality of the claims of the inhabitants of Carondelet to the commons in question, it is the opinion of many legal gentlemen that their claims are not good, inasmuch as the requirements of the laws of Spain were not complied with by the inhabitants at the time their claims were first set up to the commons lying south of the river Des Pères. It seems that the surveys and returns required by the Spanish laws were not made and filed in the land-offices. I will endeavor to make myself better acquainted with the subject, and communicate further with you upon it.

"The original grant begins on the Mississippi River and runs west with Julien's line to the Herculaneum road, thence south with that road

as far as their claim extended, embracing all the ground between said road and the river. These boundaries include as much land as the Government wants for military purposes at this post, but the limits cannot be curtailed without great inconvenience to the public service. (See the map as to our present boundaries.)

"With great respect, sir, I have the honor to be your most obedient servant,

"H. ATKINSON,
"*Brigadier-General, United States Army.*

"Hon. J. R. POINSETT,
"*Secretary of War, Washington.*"

The papers referred to in this letter as marked A, B, and C, were the notice of Baptiste Lajoye and Louis Menard, on the part of the inhabitants of Carondelet, dated June 7, 1808; the petition of Jean B. Gamache; the indorsement of Lieutenant-Governor Trudeau upon said petition, and the certificate of Surveyor Loulard, as the said several papers are hereinbefore set forth.

§ 17. The letter of the Secretary of War of June 22, 1839, to the
24 Commissioner of the General Land-Office, was referred by the latter to Solicitor Burchard, of that Office, who, on the 6th of August, 1839, gave his opinion, in writing, that Brown's survey included several thousand acres to which the village of Carondelet had no legal or equitable title; and that if such was the fact, there was no objection to a survey and sale, as public land, of all that part of the tract not needed for military purposes or covered by private claims; indeed, that that was the proper course to pursue. And the letter of the solicitor contained, also, the following words:

"I advise giving instructions to the surveyor-general to have the survey executed as required by law, viz, to retrace the exterior of the village, including the village-lots, common-field, and outlots and commons, giving the villagers the same lines which they had in 1803, and no more, unless, prior to the act of 1812, the corporate limits had been fixed beyond the limits of 1803."

§ 18. On the 24th of September, 1839, Commissioner Whitcomb communicated to William Milburn, surveyor-general for Illinois and Missouri, the substance of the said request of the Secretary of War, and of the said opinion of Solicitor Burchard, and at the same time gave said Milburn the following instructions:

"Concurring in the views of the solicitor, as stated, I request that you will make a thorough and careful examination into the whole matter, in order to determine the limits of the commons of Carondelet, to which the villagers are legally entitled, and that you will cause a survey to be made accordingly; and that such lands as may not be found to be within the limits of the commons aforesaid, or covered by private claims, may be surveyed as public lands, and plats of the same duly returned.

"You are requested to make a detailed report of all your proceedings, accompanied by copies of all the papers or records that you may be able to find, having a bearing on the claim in question, with a diagram exhibiting the limits of the commons according to the evidences of title."

§ 19. In compliance with these instructions, Surveyor-General Milburn made an extended report to the Commissioner of the General Land-Office, under date of April 15, 1840, accompanied by a plat, marked X, a copy of which plat is subjoined to this finding of facts; and his conclusions, upon a review of the whole case, were stated as follows:

"From the facts here presented and the inferences which I have

drawn, you will see that my construction of the law is distinctly in favor of the village to the extent of 150 arpents, from the southwest corner of the field-lands, and, were there no controlling circumstances, I would not hesitate to run the west boundary, as represented by the black dotted line *c d* on the Plat X, (see copy of this plat hereto attached,) which is 150 arpents, parallel to the general course of the Mississippi; but when I take into consideration the operation of Soulard, in running the line *c e* north of the river Des Pères, and the Spanish calls for the limits and common of Carondelet, in the claims of Alvarez and Valle, I am led to believe that it was the intention of the Spanish government to prolong the line *c e* to *a*, which is about parallel to the river for some distance; and that, as the act of Congress had in view the carrying out and fulfilling this intention of the Spanish government, as claimed before the board, it ought now to be adhered to, by adopting the line *c a*.

"As no great injury can result from a short delay, I have thought best to submit this statement and the accompanying documents before ordering a survey, inasmuch as there seems to be a contrariety of opinion, and you have the controlling power in case of disagreement, and can understand the subject as well in its present condition as if a new survey was actually made."

25 § 20. Said Milburn's report was referred to Solicitor McRoberts, of the General Land-Office, who, on the 22d of October, 1840, in a communication to Commissioner Whitcomb, submitted the result of his examination thereof, in which he reviewed the whole subject, and expressed his conclusions in the following terms:

"From a full examination of the subject, I have come to the conclusion that the lands included in the survey (Brown's) of the commons were not granted by the Spanish government to the inhabitants of Carondelet for the purpose contemplated, nor for any other purpose, and that the indorsement of Lieutenant-Governor Trudeau upon Gamache's petition was not a grant of the land, and can only be treated as an intention to reserve a part of the lands south of the river; in his own words, 'to furnish wood necessary to the village of Carondelet,' and that the fee-simple of the soil did not and was not intended to pass out of the Spanish Crown; and that the title to the land was in the Crown at the date of the cession, and as such passed to the United States. 2d. That the act of Congress of June 13, 1812, did not confirm the land as surveyed by Mr. Rector, nor was it effected by the act of 27th January, 1831. I, however, believe that good faith to the citizens of Carondelet, and in fulfillment of what they were led to believe was the intention of lieutenant-governor to do in the premises, that Congress will make a grant of some portion of the lands for the purpose contemplated. I, therefore, advise that the tract of land beginning on the Mississippi River at the figure 6, laid down on Plat X, and near the northeast corner of Martigny's survey, thence with the black dotted line to *d*; thence with the said line to the river Des Pères, and up the river to the line of Alvarez' survey, and across the river to *e*, and said letter *e* to *c*, and on to the river with the present survey, be reserved for the future action of Congress. The quantity within these limits is about 7,700 acres, as estimated by the clerk of the surveys. Within this tract is also situated the Jefferson Barracks in Missouri.

"By making this reserve Congress can grant the 6,000 arpents, which is all the inhabitants claimed, which is 5,104.20 acres, excluding all private claims, to the village of Carondelet for a common, or in such manner as may be deemed proper, and can retain of the public lands

1,702 acres as a site for Jefferson Barracks, or for any disposition as may be judged expedient.

"I further advise that the balance of the unappropriated lands without those limits and included in Rector's and Brown's surveys, and which amounts to several thousand acres, be surveyed and sold as public land."

§ 21. On the 11th day of November, 1840, the Acting Commissioner of the General Land-Office communicated this decision of the solicitor to the Secretary of War, who, on the 16th of that month, transmitted it to the commanding officer at Jefferson Barracks, with instructions to cause 1,702 acres to be laid off as a site for the barracks and for military purposes connected therewith, and a plat thereof to be made, and returned to the War Department as early as practicable.

§ 22. On the 20th of January, 1841, Commissioner Whitcomb sent a communication to Surveyor General Milburn, at St. Louis, transmitting a copy of Solicitor McRobert's report, and giving the following instructions to said Milburn:

"Concurring in this report, I have addressed a communication to the honorable Secretary of the Treasury, with a view of having the matter brought to the attention of Congress for such action as may be deemed proper in the way of making a grant to the village of Carondelet.

"In the mean time you are requested to represent on your
26 records the tract within the limits suggested by the solicitor and referred to in the foregoing as lands reserved for the purpose alluded to, and the balance of the unappropriated land without these limits and included in Brown-Rector's surveys, you are instructed to have surveyed as public lands, to the end that the same may be brought into market as such."

§ 23. No survey was made by the surveyor-general for Illinois and Missouri in pursuance of these instructions.

§ 24. In the year 1844 the supreme court of Missouri, in the case of Dent vs. Bingham, (8 Missouri R., 579,) rendered a decision adverse to the title of Carondelet to common, as defined by the limits assigned therefor in Brown's survey.

§ 25. On the 1st of September, 1845, Commissioner Shields, of the General Land-Office, in reply to an application by Alexander Kayser that the surveyor-general for Illinois and Missouri should be directed to carry out the said instructions of January 20, 1841, declined in the following terms to do so:

"I have carefully examined the claim, and have come to the conclusion that it would be inexpedient at present to direct the survey of those lands, nor until the further action of Congress on the subject."

§ 26. In February, 1846, Hon. J. W. Tibbatts, a Representative in Congress, incosed to Commissioner Shields a letter from P. B. Hockaday, asking for immediate action by the General Land-Office in relation to the Carondelet common; and on the 14th of that month the Commissioner answered as follows:

"I deem it inexpedient to interfere in any manner with the survey of that common as originally made by Elias Rector, prior to 1817, and retraced by Joseph C. Brown, deputy surveyor, in March, 1834, more especially as the surveyor-general, in a certificate to a plat of this common, dated 15th April, 1840, has reported to this Office that, under an act of the legislature of the State of Missouri, passed in pursuance of the act of Congress approved January 27, 1831, the corporate authorities of the town of Carondelet laid off into small tracts the land within Brown's survey of the Carondelet commons, (except a portion around

Jefferson Barracks,) and disposed of the same, or the greater part thereof, to private individuals. The lands within Rector's and Brown's survey are not subject to pre-emption or ordinary entries, as supposed by Mr. Hockaday, they having been reserved to satisfy this claim of the town of Carondelet. This Office was not disposed to trouble Congress with the matter, supposing that it would be brought before that body by the parties interested; but as Mr. Hockaday has requested prompt action, I would recommend, in view of all the facts, that the claim of the town of Carondelet to the whole common, as surveyed by Joseph C. Brown, in 1834, be confirmed; reserving as much as may be necessary for the United States post at Jefferson Barracks and all valid interferences."

§ 27. In the year 1846 Joseph Le Blond and others, inhabitants of the town of Carondelet, petitioned the President of the United States that the commons of Carondelet should be surveyed as established and recognized by Surveyors-General Rector, McCree, Milburn, and others; which petition was referred to the General Land-Office, and, on the 9th of December, 1846, was answered by Acting Commissioner Piper, who referred to the report of Solicitor McRoberts, the action of the General Land-Office of January 20, 1841, and the answer of Commissioner Shields to the application of Alexander Kayser, as the said several matters are hereinbefore set forth; and, in reference to the decision on said Kayser's application, said:

27 "This decision, which has ever since been adhered to, will enable the town of Carondelet and the settlers on those commons to present their respective claims to Congress, who can best determine the meaning of the act of 27th January, 1831, and the extent of the grant to the town contemplated thereby."

§ 28. On the 22d of August, 1848, Commissioner Young, of the General Land-Office, in answer to a communication of M. C. Jones, used the following language:

"On the 14th of February, 1846, this Office decided that it would be inexpedient to interfere in any manner with that survey, (Brown's,) and that the lands within it are not subject to pre-emption or ordinary entry, having been reserved to satisfy the claim of the town. Notwithstanding this decision, the land-officers, it is stated, have allowed entries within that survey; and Wilson Primm, esq., in a letter of the 9th instant, requested that all such entries might be canceled.

"In view of the decision above mentioned, this request will be complied with; but the question as to the extent of the grant for a common will be left for the decision of Congress."

§ 29. On the 8th of November, 1851, the city council of the city of Carondelet passed an ordinance authorizing the mayor of said city, on behalf thereof, to employ an agent to proceed in person to the city of Washington at the next session of Congress, in order to procure a confirmation of the common of Carondelet, south of the river Des Pères, according to the lines of Brown's survey of the same; and Wilson Primm was appointed such agent.

§ 30. On the 27th of December, 1851, the said city council passed an ordinance as follows:

"No. 50.

"An ordinance to convey certain lands in the common of Carondelet to the United States.

"Be it ordained by the city council of the city of Carondelet as follows:

"SECTION 1. The mayor is hereby authorized to execute a deed to the

Government of the United States for a tract of land in the common of Carondelet, south of the river Des Pères, known and designated on the plat of survey of said commons as the 'Jefferson Barracks tract,' which tract is bounded and described as follows, containing about seventeen hundred and two acres: Bounded on the north by a tract of land confirmed to Julien Chouquette; on the east by the Mississippi River; on the south by lots in the subdivision of the said common by Jasper Meyer, numbered one hundred and seventy-nine, one hundred and eighty, one hundred and sixty-one, one hundred and sixty-two, one hundred and sixty-nine, one hundred and seventy, and one hundred and seventy-one, (Nos. 179, 180, 161, 162, 169, 170, and 171;) and on the west by lots of same subdivisional survey, numbered one hundred and twenty-four, one hundred and twenty-five, one hundred and thirty-three, one hundred and thirty-four, one hundred and thirty-five, one hundred and thirty-six, one hundred and thirty-seven, one hundred and thirty-eight, and one hundred and seventy-eight, (Nos. 124, 125, 133, 134, 135, 136, 137, 138, and 178.)

"SEC. 2. The deed shall be signed and acknowledged by the mayor, attested by the register, under his official seal of the city.

"SEC. 3. The deed, when executed, shall be transmitted by the mayor to the authorized agent of Carondelet in Washington City, to be retained by him, until directed by the mayor, under a resolution of the
28 city council, to deliver the same to the proper agent of the Government of the United States in Washington City.

"This ord'nance to take effect from and after its passage."

§ 31. On the 24th of January, 1852, the said city council passed the following ordinance:

"No. 53.

"An ordinance supplementary to an ordinance entitled 'An ordinance to convey certain lands in the common of Carondelet to the United States,' approved December 26, 1851.

"Be it ordained by the city council of the city of Carondelet as follows:

"SEC. 1. The deed intended to be made to the United States by the provisions of ordinance No. 50, entitled 'An ordinance to convey certain lands in the common of Carondelet to the United States,' approved December 27, 1851, shall be a quit-claim deed, containing a reversionary clause, as follows: That so long as the United States Government shall use the said tract of land for military purposes, the title shall vest and remain in said Government; but when it ceases to be used for the purpose aforesaid, the title shall revert to the city of Carondelet.

"SEC. 2. Any ordinance or part of ordinance conflicting herewith is hereby repealed.

"This ordinance shall take effect and be in force from and after its passage."

§ 32. On the 28th of February, 1852, a special meeting of said city council was held, at which the president thereof stated that he had received a dispatch from the agent at Carondelet in Washington City, requesting that an absolute deed be sent to him for the Jefferson Barracks tract; whereupon, on the 18th of March, 1852, an ordinance was passed repealing the ordinance No. 53 of January 24, 1852.

§ 33. At the same meeting of said city council the following resolutions were passed:

"Resolved, That the mayor is hereby directed and instructed to retain the deed to the United States until advice can be received of a decision by the Department of the Interior in Washington City favorable to the claim of the common of Carondelet south of the river Des Pères.

"Resolved, That as soon as such advice is received, the mayor is directed to transmit said deed without delay."

§ 34. On the 4th of March, 1852, Commissioner Butterfield, of the General Land-Office, in answer to a communication from Messrs. Geyer, Primm, and Williams, (who represented Carondelet commons,) asking that the orders and instructions of Commissioner Whitcomb to Surveyor-General Milburn, of January 20, 1841, should be rescinded and set aside, answered as follows:

"As the decision of the Solicitor and the instructions of Commissioner Whitcomb were not executed, I regard them as overruled by the subsequent action of Commissioner Shields, (acting,) Piper, and Young, and that it has been settled that this Office must not disturb, or in any manner interfere with, the aforesaid survey by Brown, unless Congress shall otherwise order by further legislation; but that the said survey is subject to such adverse valid rights as may exist under confirmed private claims, and also to the right of the United States in the military reservation for Jefferson Barracks, as had in virtue of law, and the rights the United States possess under treaty as the successor of Spain.

29 I therefore regard this Office, under existing laws, as having no further power or control over the subject."

§ 35. On the said 4th of March, 1852, Commissioner Butterfield made a report in regard to the Carondelet commons to the Committee on Public Lands in the Senate, concluding with these words:

"In view, then, of what has been done by Commissioner Shields on review, and by Acting Commissioner Piper, and by Commissioner Young, I hold it settled by them, that we are to treat Brown's survey of 1834 as showing the lands which this Office must hold in reservation, to satisfy the claims of the commons of Carondelet, subject to any adverse private rights, and to the military reservation, and also subject to any further action which Congress may be pleased to take in the way of passing an explanatory law, either for limiting the extent to a specific and reduced quantity, or confirming all the land in said survey with special protection, if deemed necessary, of adverse claims."

§ 36. On the 8th of June, 1852, Acting Commissioner Wilson decided that the survey made before 1817, which was retraced by Brown in 1834, should be adhered to under the stipulations specified in the Commissioner's report of the 4th of March, 1852, and that the General Land-Office was not authorized to order a new survey on the north boundary of the commons, as had been requested by the persons representing the city of Carondelet.

§ 37. On appeal from the decision of the Commissioner of the General Land-Office to the Secretary of the Interior, that officer, on the 25th of January, 1853, rendered the following decision:

"After careful consideration of this case, I am led to concur in the opinion expressed and judgment pronounced by the supreme court of the State of Missouri at the July term, 1844, in the case of Dent vs. Bingham, which involved the same principles which are at issue in this case.

"I am of the opinion that the refusal of the lieutenant-governor, Trudeau, on the 7th December, 1796, to make the grant asked for in the petition of Gamache, is not evidence of title. The answer of Lieutenant-Governor Trudeau is, at the most, merely evidence of an intention or purpose to

make a grant, but certainly does not of itself constitute a grant. A proprietor may very properly assign as a reason for not making a particular concession, his purpose to dispose of the property in another way, but the expression of such purpose vests no right or title, legal or equitable, in the party in whose favor this intention has been expres'ed. The only source from which the village of Carondelet can derive a title in this case is the confirmatory action of Congress. That action was founded on and limited by the claim set up by Carondelet. The confirmation was not intended to extend, and did not extend beyond the claim asserted, and that claim was for 6,000 arpents, extending in a direction described in the claim as filed. It was not a claim by metes and bounds for an estimated quantity of land, for if it had been, then the boundaries and not the quantity would have governed; but it was a claim for a specified quantity of 6,000 arpents, without regard to the boundaries except on the side next the village, and extending from the boundary of the village as far as might be necessary to embrace the quantity of 6,000 arpents claimed.

"This was the claim which was confirmed, and, in my judgment, the village can claim no more.

"If, therefore, that quantity can be had without interfering with the rights of others which had vested prior to the act of confirmation, the village of Carondelet is entitled to have it laid off.

"The Land-Office will cause the necessary orders to be made to give effect to this decision.

"A. H. H. STUART,
"*Secretary.*

"DEPARTMENT OF THE INTERIOR,
"*Washington, January* 25, 1853."

§ 38. On the 5th of February, 1853, the Commissioner of the General Land-Office made known the decision of Secretary Stuart to the surveyor-general at Saint Louis, and instructed him to cause a survey of the Carondelet commons to be executed in accordance with that decision.

§ 39. On the 23d of March, 1853, the surveyor-general requested of the Commissioner further instructions, which, however, were not given, and no survey was made, as required by the Commissioner's said instructions.

§ 40. On the 27th of June, 1854, the city council of Carondelet passed the following ordinance:

"No. 152.

"An ordinance to convey the Jefferson-Barracks tract to the United States.

"Be it ordained by the city council of the city of Carondelet, as follows:

"SECTION 1. The mayor is hereby authorized to execute a quitclaim deed to the Government of the United States for a tract of land in the common of Carondelet, south of the river Des Pères, known as the Jefferson Barracks, and more particularly described in ordinance No. 50, entitled 'An ordinance to convey certain lands in the common of Carondelet to the United States,' approved December 27, 1851.

"SEC. 2. The deed shall be signed and acknowledged by the mayor, attested by the register under the official seal of the city, and shall be

transmitted by the mayor to the Secretary of the Interior of the United States.

"SEC. 3. Ordinance No. 53, approved January 24, 1852, requiring such deed to contain a reversionary clause, is hereby repealed."

§ 41. Some time between the date of this ordinance and the 28th of the next month, but on what day does not appear, the corporate authorities of Carondelet sent to the Commissioner of the General Land-Office a deed executed by said authorities, in pursuance of said ordinance, for the 1,702 acres of land held for the use of Jefferson Barracks; which deed the Secretary of the Interior, on the 28th of July, 1854, transmitted to the Secretary of War, with a letter, the concluding words of which were as follows:

"As your decision as to the sufficiency of the deed for the full protection of the interests of the War Department in the tract in question [the Jefferson Barracks tract] may have a bearing upon a case now before this Department, I have most respectfully to request that I may be advised of the result of your deliberation on the subject."

The said deed was referred by the Secretary of War to the Attorney-General, who, on the 9th of October, 1854, recommended that, owing to defects therein, it should be accepted de bene esse and provisionally, and meanwhile another deed free from defects should be prepared and executed.

§ 42. This recommendation was complied with, and, on the 25th
31 of October, 1854, the following deed was duly executed by the mayor of Carondelet, and delivered to the Secretary of the Interior, and on the 9th of December, following, recorded in the recorder's office of Saint Louis County, Missouri:

"Know all men by these presents that the city of Carondelet, pursuant to an ordinance of said city, entitled 'An ordinance to convey the Jefferson Barracks tract to the United States,' approved June 27, 1854, and in consideration of the sum of five dollars to said city in hand paid, has granted, remised, released, and forever quitclaimed, and does by these presents grant, remise, release, and forever quitclaim; and the undersigned, John Festor, as mayor of said city, hereby conveys unto the United States of America a certain tract of land lying in the county of Saint Louis, State of Missouri, within the common of said city of Carondelet, south of the river Des Pères, and known and designated on the plat of survey of said common as the Jefferson Barracks tract, and which is bounded as follows, and contains seventeen hundred and two acres more or less, to wit: On the north by a tract of land confirmed to Julien Chouquette; on the east by the Mississippi River; on the south by lots in the subdivision of the said common, by Jasper Meyer, numbered one hundred and seventy-nine, (179,) one hundred and eighty, (180,) one hundred and sixty-one, (161,) one hundred and sixty-two, (162,) one hundred and sixty-nine, (169,) one hundred and seventy, (170,) one hundred and seventy-one, (171;) and on the west by lots of the same subdivision survey, numbered one hundred and twenty-four, (124,) one hundred and twenty-five, (125,) one hundred and thirty-three, (133,) one hundred and thirty-four, (134,) one hundred and thirty-five, (135,) one hundred and thirty-six, (136,) one hundred and thirty-seven, (137,) one hundred and thirty-eight, (138,) and one hundred and seventy-eight, (178:) to have and to hold the same to the United States of America forever.

"In testimony whereof, under the provisions of said ordinance, the

mayor of said city has hereto signed his name, and the register of said city has attested the same under the corporate seal of said city, this 25th day of October, A. D. 1854.

[SEAL.] "JOHN FESTOR, *Mayor.*

"Attest:

"BERNARD POEPPING, *Register.*"

§ 43. On the 12th of January, 1855, the Secretary of War informed the Secretary of the Interior that the terms of said deed were satisfactory to the War Department.

§ 44. In 1839, and again in 1845, the authorities of the town of Carondelet caused the commons south of the river Des Pères, which did not conflict with the Jefferson-Barracks tract, or with confirmed private claims, to be laid off in small tracts and leased; and the leases contained a clause that the town would not be responsible in case of a failure of title, and a large number of persons became lessees of said tracts; and the action of the General Land-Office in regard to Brown's survey caused a doubt in relation to the title of the lands so leased, greatly disturbing the lessees. In 1854 an attorney of one of the lessees was active in urging upon the mayor and members of the city council of Carondelet that they should cede the Jefferson Barracks tract to the United States; and he represented to them that that was the only condition on which the confirmation of Brown's survey could be obtained; that that
32 survey had been set aside in 1841, or thereabouts; that, without a re-establishment of it, Carondelet could not make out her title to the common; that, even since that survey had been set aside, Carondelet had been in litigation with trespassers on the common; that Carondelet could never get a survey so long as the War Department opposed it, which it would do until Carondelet gave up the barracks tract; but that as soon as Carondelet gave that up, and the Secretary of War was satisfied, the Secretary of the Interior was ready to give a survey. The said attorney had been to Washington City several times to obtain a confirmation of said survey, and he represented to said mayor and members of the city council that he had talked with the Secretary of War and the Secretary of the Interior, and knew their views perfectly; and that the former wanted the barracks tract for the War Department, and he would not let the latter approve the survey of the common until that tract was given up to the United States. In consequence of these representations—none of which appear to have been made by the authority, or with the knowledge, of any officer of the Government of the United States—the city council of Carondelet passed the aforesaid ordinance of June 27, 1854.

No money was paid by the United States to the city of Carondelet, as a consideration for the execution of the aforesaid deed of October 25, 1854, nor was any asked or expected.

§ 45. On the 26th of March, 1854, the Commissioner of the General Land-Office addressed a letter to the Secretary of the Interior, asking what disposition should be made of the lands which might be detached by a new survey from Brown's survey of the Carondelet commons, and which are not included in any other claim; and, on the 2d of April, 1854, the Commissioner submitted to the Secretary of the Interior the communication above referred to, dated March 23, 1853, from the surveyor-general at Saint Louis to the Commissioner, asking further instructions in relation to certain points, in order to enable him to carry out the decision of Secretary Stuart above set forth.

§ 46. Secretary McClelland, of the Department of the Interior, answered these two communications of the Commissioner, as follows:

"DEPARTMENT OF THE INTERIOR,
"*February* 23, 1855.

"SIR: In your letter of 26th of March *last*, [error, the letter referred to was dated March 26, 1853,] you ask what disposition is to be made of the lands which may be detached by a new survey from Brown's survey of the Carondelet commons; and with your letter of the 2d of April last you submit a communication from the surveyor-general of Illinois and Missouri asking further instructions in relation to certain points named therein, in order to enable him to carry out the decision of my predecessor in the case.

"To arrive at a satisfactory conclusion on this subject, I found it necessary to examine the whole question involved, where it appeared that the decision of my predecessor was only partial and actually left the whole case open. I have, therefore, carefully examined it as one of original jurisdiction, and after having given due weight and consideration to all the evidence submitted, and to the arguments presented both for and against the claim of the inhabitants of Carondelet, and the action heretofore had by this Department, I am clearly of the opinion that undue importance has been given to the decision had by the supreme court of the State of Missouri, in the case of Dent vs. Bingham, on which the decision of my predecessor is based, especially as that decision was arrived at through a division of opinion on the part of the three
33 judges sitting in the case; two of those judges having come to the same conclusion on different and opposite grounds, and the third not only dissenting from the opinions expressed by a majority of the court, but also from the decision there made by them; and more especially as the concurrence of Judge Tompkins, one of the two judges above alluded to, was based on an opinion previously given by him 'that the acts of 1812 and 1831 availed the claimants or village-lots, out-lots, and commons nothing, unless they presented their claims before the recorder of land-titles,' which view has been subsequently overruled by the same court and also by the Supreme Court of the United States in the case of Guitard vs. Stoddard, (16 Howard, pp. 494 to 513.)

"Congress, by the act of June 13, 1812, confirmed the right, title, and interest of the inhabitants of Carondelet to a common, and designated the principal deputy surveyor as the person who should determine by a survey, the extent of that common, and this survey was made in 1816 or 1817, by the proper officer. On the 26th May, 1824, Congress passed another act requiring, among other things, that the surveyor-general should survey and designate the commons belonging to the several villages according to their respective claims and confirmations under the act of 1812, where the same had not already been done. Carondelet commons was 'already' surveyed, and was not, therefore, affected by the act of 1824. On the 27th January, 1831, Congress relinquished to the inhabitants of the several towns or villages, all the right, title, and interest of the United States in and to the commons as confirmed to them by the act of 1812.

"As Rector's survey of 1816 or 1817 was made prior to the survey of the surrounding public lands, it was necessary, under the act of 1831, to connect it with such surrounding lands, and E. T. Langham, the then surveyor general, by virtue of authority duly vested in him, instructed the deputy surveyor, Joseph C. Brown, to retrace Rector's lines of the

Carondelet survey and to correct it with the adjoining surveys by establishing the proper corners at the intersection of the lines thereof. Brown, in 1834, under these instructions, retraced the Rector lines, and states in his returns to the surveyor general, that Rector's corners and his western and southern boundaries were easily found and identified by him.

"Under this state of facts, the question to be determined appears to me to be, does the act of 1812, the operations had under that act, and the subsequent acts of 1824 and 1831, of themselves constitute a title in Carondelet to the whole extent of the survey made by Rector in 1816 or 1817, and retraced by 1834?

"The Supreme Court of the United States, in Strother vs. Lucas, says: 'A confirmation of a title by act of Congress not only renders it a legal title, but furnishes higher evidence of that fact than any patent, inasmuch as it is a direct grant of the fee by the Government itself, whereas a patent is only the act of its ministerial officers.'

"And in the case of Mackey vs. Dillon, the same court says: 'The act of Congress of 1812, confirming the claim to commons adjoining and belonging to the town of Saint Louis, did not define the extent and boundaries of these claims, nor adopt the evidence laid before the board of commissioners for that purpose; the boundaries of the claims thus confirmed were designedly left open to the settlement of the respective claimants by litigation in the courts of justice or otherwise.'

"The act of 1831 was passed with a full knowledge by Congress of all that had been previously done in the case, to wit, the survey of Rector and the reservation of the Jefferson Barracks tract. Such is
34 the legal presumption, and it seems to me sound. The reservation of the barracks, though not expressed, is implied, as in the case of Fort Saint Marks, Florida, for which see the case of Mitchell et al. vs. The United States, (15 Peters, pp. 52 to 92.)

"In view, therefore, of all the facts and circumstances of this case and of the opinions expressed by the highest legal tribunals known to our laws, I am impelled to the conclusion that, as the surveys of 1816 and 1834 were executed by competent authority, were duly approved, and were for a series of years acquiesced in by the inhabitants of Carondelet, both the Government of the United States and the inhabitants of Carondelet are estopped and concluded thereby.

"My decision, therefore, is, that the survey of 1816 or 1817, as retraced by Joseph C. Brown in 1834, should be sustained, excluding, of course, the 1,702 acres heretofore set apart and reserved for the use of the military post at Jefferson Barracks, and that the parties claiming adversely to Carondelet should not be hindered thereby from establishing and settling their rights before the judicial tribunals of the country.

"You will furnish the surveyor-general of Illinois and Missouri with a copy of this decision, and instruct him to have the lines of the original reservation for Jefferson Barracks properly run and marked in the field, if that has not already been done, and to make the usual and proper return thereof to your office, and to that of the register of the land-office at St. Louis.

"Very respectfully, your obedient servant,

"R. McCLELLAND,
"*Secretary.*

"To the COMMISSIONER OF THE GENERAL LAND-OFFICE."

§ 47. On the 26th of February, 1855, the Commissioner of the General

Land-Office communicated this decision to the surveyor-general at Saint Louis, with instructions in conformity therewith.

§ 48. On the 6th of April, 1855, the Commissioner submitted to Secretary McClelland certain arguments and papers intended to show that the surveys of Rector and Brown were not substantially identical.

On the 16th of May, 1855, Secretary McClelland answered the Commissioner, as follows:

"I have carefully reviewed the whole subject, and cannot resist the conclusion her'tofore arrived at, that Brown's survey is a substantial retracement of Rector's, and is to be taken and regarded as such. You will be pleased, therefore, to have the surveyor-general resume his operations, which were, under your direction, temporarily suspended during the pendency of this re-examination, and have him carry into effect the decision heretofore made."

§ 49. In pursuance of this decision, the surveyor-general at Saint Louis caused a survey to be made of the Carondelet commons, showing the lines of the Jefferson Barracks tract, and of all confirmed private claims within the out-boundaries of Brown's survey of said commons; and on the 8th of October, 1855, the said survey was approved by said surveyor-general, in the following terms:

"The above plat of survey No. 3102, in townships 43 and 44 north of the base-line, and ranges 6 and 7 east of the 5th principal meridian, of the tract of land confirmed to the inhabitants of the village of Carondelet by the first section of the act of Congress approved the 13th of June, 1812, entitled 'An act making further provision for settling the claims to land in the Territory of Missouri,' and showing the connections of that survey with the lines of the adjoining public and
35 private surveys, is strictly conformable to the field-notes thereof on file in this office, which have been examined and approved. It was originally executed about the year 1817, by Elias Rector, deputy surveyor, whose field-notes are not dated, and its lines were subsequently retraced, between the 11th and 17th days of March, 1834, by Joseph C. Brown, deputy surveyor, under instructions of the 10th of the same month from Elias T. Langham, surveyor of the public lands for the district of Illinois and Missouri. The said survey, as retraced by the said Brown, was sanctioned by the decision of the Hon. R. McClelland, Secretary of the Interior, dated the 23d of February, 1855; which decision was transmitted to this office for its information and government. And pursuant to said decision there is hereby made a distinct and unqualified exclusion from the said survey No. 3102 of survey No. 3341, executed to the amount of 1,702.04 acres, (as shown by the field-notes furnished this office on the 28th March, 1855, by the Commissioner of the General Land-Office,) on the 3d December, 1840, by Geo. W. Waters, under instructions from the War Department, of the military reserve at Jefferson Barracks, as the absolute property of the United States, set apart for their own special use, and in exclusion from any laws for the disposal of the public domain; and, in further pursuance of said decision, it is hereby declared, that as regards the rights of all other claimants within the limits of said survey No. 3102, who hold adversely to Carondelet, this approved plat is in no manner intended, nor shall it be construed, to interfere with the rights of such adverse claimants as seek a judicial settlement of their several interests.

"JOHN LOUGHBOROUGH,
"*Surveyor-General.*"

§ 50. On the 25th of October, 1854, the land embraced in the Jeffer-

son Barracks tract, as laid down in the survey thus finally approved, was worth $172 per acre; and in the year 1859 it was worth $400 per acre; the valuation in each case being without regard to the improvements made on the land by the United States. No value later than 1859 is shown.

§ 51. The quantity of land embraced within the out-boundary lines of Brown's survey, as finally approved, was 9,905.20 acres; and, after deducting from that quantity the Jefferson Barracks tract and all private confirmed claims, there remained at Carondelet, as commons, about 6,050 acres; which is nearly 1,000 acres more than was originally claimed, in 1808, by the inhabitants of Carondelet, namely, 6,000 arpents, equal to 5,104.20 acres.

Upon the foregoing facts the conclusions of law are:

1. That the Commissioner of the General Land-Office and the Secretary of the Interior had lawful power to set aside, in part or in whole, Brown's survey of the Carondelet commons, and did set it aside as to the Jefferson Barracks tract, which they adjudged to belong to the United States.

2. The deed made by the corporate authorities of Carondelet to the United States was made with the full knowledge of all the facts of the case, and of the previous decisions of the courts as to Carondelet's title, and for an advantage to Carondelet under the existing circumstances, in the settlement of a doubtful title, which constituted a valuable consideration for said deed.

3. That the claimant is not entitled to recover.

The grounds of these conclusions are more fully stated in the following

36 *Opinion.*

DRAKE, Ch. J., delivered the opinion of the court:

This suit was originally brought in the name of the city of Carondelet. In 1870, however, that city was, by an act of the general assembly of the State of Missouri, merged in, and made a part of, the city of Saint Louis, which was, by the order of this court, substituted as claimant.

The facts of the case are fully stated in the finding by the court, and they will therefore be referred to in this opinion only so far as may be necessary to a clear statement of the points at issue.

When, in 1803, the French province of Louisiana was ceded to the United States, Carondelet was an insignificant hamlet on the west bank of the Mississippi River, some six miles south of the then village of Saint Louis.

About a mile and a quarter south of Carondelet, as it then existed, a small stream, called the river Des Pères, after flowing eastwardly, emptied into the Mississippi.

During the French and Spanish rule in the province of Louisiana each village was entitled to more or less contiguous land as commons, to which all the inhabitants might resort for wood, hay, or other products of the soil. Carondelet had its commons; but, at the time of the cession, in 1803, neither the quantity nor the boundaries thereof had been defined or ascertained by any official act of the French or Spanish authorities.

After the cession the United States organized a board of commissioners to pass upon claims to land in the ceded territory. The inhabitants of Carondelet presented to this board their claim to "6,000 arpents of

land, situate adjoining said village, by virtue of a concession from Don Zenon Trudeau, lieutenant-governor of Upper Louisiana, dated the 7th December, 1796." A majority of the board rejected the claim.

Had matters remained at that point, there would have been no foundation for any title in Carondelet to any commons. But by the first section of the act of June 13, 1812, (2 Stat. L., 748,) the claim of that village to commons was confirmed, in general terms, without any designation of boundaries or quantity; both of which were by the act required to be ascertained by an official survey; upon the completion of which, and its approval by the United States, the title would be complete without any further act on the part of Carondelet or the United States.

Out of this indefiniteness in the confirmation has grown all the protracted difficulty in which Carondelet, and those claiming title under her, have been involved.

The controversy in this suit is connected with the claim of Carondelet to commons south of the river Des Pères; but, nevertheless, the validity of her title to land south of that river is not here involved. That has been finally and definitively settled in favor of Carondelet, by both the executive and the judiciary. But it was not settled for many years after the passage of the act of 1812, and the controversy here is in relation to acts of officers of the Government during the period of uncertainty as to whether the title to commons extended at all south of the river Des Pères. It is necessary, therefore, to bring into view some of the provisions of that act, and the action of Carondelet and the Executive Departments of the Government, through the period of forty-three years that elapsed, between 1812 and 1855.

By the first section of the act of 1812, it was enacted as follows:

"And it shall be the duty of the principal deputy surveyor of
37 the said territory, as soon as may be, to survey or cause to be surveyed and marked, (where the same has not already been done according to law,) the out-boundary lines of the said several towns or villages, so as to include the out-lots, common-field lots, and commons thereto respectively belonging. And he shall make out plats of the survey, which he shall transmit to the surveyor-general, who shall forward copies of the said plats to the Commissioner of the General Land-Office and to the recorder of land-titles."

This provision designates the officer to make surveys and the officer to whom the plats of the surveys should be transmitted; the former being styled "the principal deputy surveyor of said Territory," and the latter "the surveyor-general." It is necessary, as will presently appear, to know the legal character of those officers, and it is found by reference to previous acts of Congress.

The act of May 18, 1796, "providing for the sale of the lands of the United States in the territory northwest of the river Ohio, and above the mouth of Kentucky River," (1 Stat. L., 464,) created the office of surveyor-general.

The act of February 28, 1806, "extending the powers of the surveyor-general to the Territory of Louisiana, and for other purposes," (2 Stat. L., 352,) required the surveyor-general "to appoint a sufficient number of skillful surveyors as his deputies in the Territory of Louisiana, one of whom he shall, with the approbation of the Secretary of the Treasury, designate as his principal deputy for the same;" and the principal deputy was required to reside and keep an office in said Territory of Louisiana, and, under the superintendence of the surveyor-general, to exe-

cute, or cause to be executed by other deputies, such surveys as might thereafter be authorized by law.

These provisions were in force when the act of June 13, 1812, was passed; and hence the designation in that act of "the principal deputy surveyor of said Territory" as the officer to make surveys of the claims thereby confirmed.

On the 29th of April, 1816, (3 Stat. L., 325.) an act was passed creating the office of "surveyor of the lands of the United States in the Territories of Illinois and Missouri," and abolishing the office of "principal deputy surveyor," and devolving his duties upon the newly-created officer; among which duties the act named that of causing to be surveyed the claims which had been or might thereafter be confirmed by any act of Congress, and which had not already been surveyed according to law.

The bearing of these acts upon this case will now be seen.

In the latter part of the year 1816, Elias Rector, a deputy surveyor under William Rector, the surveyor for Illinois and Missouri, appointed under the last-named act, made a survey, the field-notes of which, without date and signed merely with the initials "E. R.," and accompanied by no plat, were deposited in the office of the surveyor. Why, or by whose direction, or by what authority he made said survey, does not appear; nor does it appear that William Rector, or any of his successors in office, ever approved that survey. On the contrary, it appears that, as late as the 25th of April, 1829, William McCree, then surveyor for Illinois and Missouri, in answer to a specific inquiry whether there were any official documents known to him which showed that any limits of the claim of Carondelet to commons had ever been designated, and whether he had any other official knowledge on that subject than what was contained in the act of Congress of the 13th of June, 1812, stated

that the only information possessed by his office and on file therein
38 was that act, and a statement in the "Register d'Arpentage,"

from which it appeared that, by virtue of an order from the lieutenant-governor, a line had been run from the southwest corner of the lands of the inhabitants of Carondelet to the river Des Pères.

This line can be no other than that which was run by Surveyor Soulard in 1797, which included nothing south of the river Des Pères.

Hence it appears that, whenever or however the field-notes of Rector's survey found their way into the surveyor's office, they were not, in 1829, recognized by that officer as indicating the limits of the commons of Carondelet, if, indeed, they were at all known to him.

In fact, there is no evidence in the case showing any recognition whatever of that survey by any officer of the Government prior to the year 1834, when Surveyor Langham ordered his deputy, Joseph C. Brown, to retrace the lines of Rector's survey; which was substantially done.

In the absence of recognition by the surveyor-general, that survey had no force or value as an official ascertainment of the limits of the Carondelet commons; for, though Elias Rector was a deputy surveyor, he was not "the principal deputy surveyor of the Territory," mentioned in the act of 1812. As just shown, no such office as "principal deputy surveyor" existed after the 29th of April, 1816. In lieu of him was the surveyor for Illinois and Missouri, whose duty it was to cause the commons to be surveyed; and no survey made—as was that of Elias Rector so far as appears—without the authority of that officer, had any legal effect in determining the limits of the commons.

Hence, though the title to Carondelet to commons actually depended upon the making of an authentic survey, a period of nearly twenty-three

years elapsed after the passage of the act of 1812 before proper steps were taken by the proper officer to cause it to be made. They were taken only when Brown's survey was made in 1834. So far as appears, that was the first legitimate and authorized attempt to ascertain and fix the limits of the commons.

While the extent of the title of Carondelet was thus undefined, and while it had not been officially ascertained whether the commons extended at all south of the river Des Pères, it seems that the belief that they did so extend had arisen among the inhabitants of Carondelet and others; for in July, 1826, an assistant quartermaster of the United States Army procured twelve of the inhabitants to execute to the United States a quit-claim deed for a tract of land lying within the out-boundary lines of Rector's survey, and described as "a part of a large quantity which the said parties of the first part claim as common, belonging to the inhabitants of the village of Carondelet." This tract lay south of the river Des Pères, and the description called for the southern boundary-line of the commons as a limit.

The execution of this deed was followed by the taking possession by the Government of the tract conveyed, and the subsequent erection thereon of Jefferson Barracks.

From this time till 1855 there was controversy between Carondelet and the Government in regard to the title of the former to commons south of the river Des Pères, the history of which is given at large in the finding of facts, and which need not be repeated here.

It is sufficient for the purposes of this opinion to say that Brown's survey contained within its out-boundaries nearly double the quantity of land claimed by the inhabitants of Carondelet in 1808, before the board of commissioners; that, in January, 1841, the Commissioner of the General Land-Office disapproved of Brown's survey, and
39 directed the surveyor-general at Saint Louis to represent on his records a portion of the land within that survey, estimated to contain 7,700 acres, and including the barracks tract, as reserved for the future action of Congress; and to cause the remainder of the land included in Brown's survey to be surveyed as public land, to the end that it might be brought into the market as such.

In 1853 the subject of Carondelet's title came before Secretary Stuart, of the Department of the Interior, who held that Carondelet was entitled to 6,000 arpents of land and no more, and directed that quantity to be laid off, if it could be had without interfering with the rights of others which had vested prior to the act of June 13, 1812.

From this brief history of the action of the Government officers in connection with this subject we turn to the proceedings of the corporate authorities of Carondelet, which resulted in the execution, in 1854, of the deed whose validity is assailed by the claimant.

Carondelet had subdivided the land south of the river Des Pères into small tracts, and, in 1839 and 1845, leased the same to individuals, probably one hundred in number, with express stipulation that Carondelet should not be responsible in case of a failure of title. The lessees were, therefore, dependent for title upon the existence of an authentic official survey of the commons south of that river. They had doubtless relied on that of Brown. When, therefore, the action of the Commissioner of the General Land-Office became known, but more especially after the decision of the supreme court of Missouri, in 1844, in Dent vs. Bingham, (8 Missouri, 579,) adverse to the title of Carondelet, as defined and limited by Brown's survey, the lessees were greatly disturbed, and, without doubt, endeavored to influence the authorities of Carondelet to take

some action which would settle the dispute about the survey favorably to their title.

On the 27th of December, 1851, the city council of Carondelet, of their own mere motion, so far as appears, and certainly without any suggestion thereto by any officer of the Government, passed an ordinance authorizing the mayor of the city to execute a deed to the United States for the barracks tract, and requiring the deed, when executed, to be transmitted to the authorized agent of Carondelet in Washington City, to be retained by him until directed by the mayor, under a resolution of the city council, to deliver the same to the proper agent of the Government in Washington City.

On the 24th of January, 1852, the council passed a supplementary ordinance requiring that the deed previously authorized should be a quit-claim deed, containing a reversionary clause, to the effect that so long as the United States Government should use the said tract of land for military purposes, the title should vest and remain in said Government, but when it should cease to be used for that purpose, the title should revert to Carondelet.

On the 28th of February, 1852, the city council, being requested by the agent of Carondelet in Washington City to send him an absolute deed for the barracks tract, passed an ordinance repealing that prescribing a reversionary clause, and at the same time adopted resolutions directing the mayor to retain the deed to the United States until advice could be received of a decision by the Department of the Interior favorable to the claim of the commons south of the river Des Pères, and to transmit the same as soon as such advice should be received.

Again, on the 27th of June, 1854, no settlement of the controversy in regard to the commons having been effected, the city council of Carondelet passed another ordinance, again repealing that which prescribed a reversionary clause in the deed, and directing the mayor to execute a deed to the United States of the barracks tract, and transmit the same to the Secretary of the Interior.

Under this ordinance a deed was executed and transmitted; but being, in the opinion of the Attorney-General, defective, it was accepted provisionally, until another, free from defects, could be executed, which was done on the 25th of October, 1854. The deed executed on that day was delivered to the Secretary of the Interior and recorded, and is that which it is sought in this suit to have declared null and void.

On the 23d of February, 1855, the Secretary of the Interior, Mr. McClelland, finally decided in favor of Brown's survey of the commons, excluding the barracks tract, and reserving to parties claiming adversely to Carondelet the right to establish and settle their rights before the judicial tribunals of the country.

This terminated the protracted controversy, until Carondelet instituted this suit to recover the value of the barracks tract.

To sustain that claim, the claimant relies upon two positions: 1. That the action of the Commissioner of the General Land-Office, disapproving of Brown's survey, and the decision of Secretary Stuart of the same import, and the final decision of Secretary McClelland excluding the barracks tract from the confirmation of Brown's survey, were all without authority of law; and, 2. That Carondelet was constrained by the illegal acts of the first-named two officers to make the deed of 1854, in order to obtain a final settlement of her title; and the said deed, having been given without consideration, is void; and therefore the claimant is entitled to recover of the United States the value of the barracks tract.

As to the first point, we hold that the action of the Commissioner of

the General Land-Office and of the two Secretaries of the Interior was within the purview of their lawful authority, and that the final decision of Secretary McClelland was conclusive, and cannot be reversed or revised by the judiciary.

So far as the action of the Commissioner is concerned, the case is almost identical in its main features with that of Castro vs. Hendricks, (23 Howard, 438.) There the Commissioner of the General Land-Office refused to issue a patent for a tract of land in California which had been confirmed to Castro and surveyed for him under the authority of the surveyor-general of California; and the refusal was based upon the fact that the lines of the survey ran out of the grant which had been confirmed into the public land, and gave to Castro two leagues and a half more land than he ought to have; the surplus being taken from the lands of the United States. Castro sought by mandamus to compel the Commissioner to execute to him a patent for the land as surveyed; but the Supreme Court held that the Commissioner is by law invested with a supervision and control over the acts of subordinate officers charged with making surveys, and that his refusal to issue the patent was an appropriate exercise of the functions of his office.

The action taken by the Secretary of the Interior is equally sustained by this decision; for he is by law the superior officer, authorized to control the action of the Commissioner. There is, then, no ground whatever for holding the acts of either the Commissioner or the Secretary in the premises to have been an unlawful exercise of power.

The determination of that point leaves nothing for the claimant to rest the other branch of his case upon. It is claimed that the deed of Carondelet to the United States, conveying the barracks tract, is void on two grounds: 1. That Carondelet was constrained, by the illegal acts
41 of the Commissioner and Secretary Stuart, to make the deed; and, 2. That the deed, having been made without consideration, is void; and therefore the claimant is entitled to recover the value of the land. The first position having been shown to be untenable, the claimant's whole case rests upon the second.

In regard to this, while it is true that the United States paid no money to Carondelet as a consideration for the execution of that deed, yet there was, in fact, ample consideration in law to sustain it, in the benefit conferred on Carondelet by the final settlement of its doubtful title to commons. From the first it had been a question whether that village was entitled to any land as commons south of the river Des Pères, and also what quantity of land it was entitled to as commons. Though the claim of Carondelet was confirmed, those two points had to be determined before the extent and boundaries of the claim could be fixed; and until they were fixed the title was incomplete. Carondelet would not wait till they were officially and definitively settled, but proceeded to subdivide and lease lands within boundaries which had never been finally sanctioned by the proper authorities. Trouble necessarily ensued, not only between Carondelet and the United States, but between Carondelet and its lessees. The only possible relief from that trouble, under the then existing laws, was in a final and authoritative settlement of the boundaries of the commons.

Under these circumstances, Carondelet, in 1851, made the first move in the direction of relinquishing all claims to the barracks tract, in order to procure the confirmation of Brown's survey, and authorized a deed to that effect to be executed. Again, in 1854, the move was repeated. In both instances Carondelet acted without any suggestion thereto by the Government, with a full knowledge of all the facts, and under legal

advice. No constraint was exercised over her authorities in their action. Much less was there anything like duress. So far as appears, they acted with perfect freedom, and directed their action to accomplish a result of great benefit to the city and those holding under it. There is no ground, therefore, for invalidating the deed executed by Carondelet to the United States.

The petition of the claimant must be dismissed.

NOTT J., dissenting:

The findings of fact in this case I deem to be nothing more than an epitome of the evidence, and to fail in being a finding of facts in the nature of a special verdict. Regarding them as a correct epitome of the evidence, I assent to them pro forma to avert another year of delay in obtaining the ultimate decision of this case by the Supreme Court.

The facts which the evidence establishes are in my judgment few and brief, and may be stated informally as these:

I. The boundaries of the Carondelet commons were traced by Rector in 1816 under the acts , 1812, and were retraced by Brown in , 1834, and finally confirmed by the Secretary of the Interior in 1855.

II. In 1826 the Government entered upon this tract, and from that time to the present has occupied a plot entirely within the boundaries of the commons for the purpose of a military post and reservation. The Government has never set up any title adverse to that of Carondelet. Its possession has been avowedly under, first, a deed from certain inhabitants of Carondelet, executed in 1826, for a nominal consideration; and, second, another deed executed in 1854 by the city of Carondelet, also for a nominal consideration; and as to neither deed has any consideration ever been paid.

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III. At various times prior to the execution of this second deed, on which the Government now relies, the city of Carondelet sought to procure the confirmation of Rector and Brown's surveys, and a patent for its common under the act of 1812, but the Secretary of War interfered by requesting the officers of the Interior Department not to confirm the surveys and not to issue a patent until the title of the Government to the military reservation could be secured. The Secretary of the Interior, complying with such request, delayed acting upon the application of Carondelet. It was then represented to the corporate authorities of the city that such action would continue to be withheld until a conveyance should be made to the Government of the Jefferson Barracks tract. These representations were made without the authority of the Secretary of the Interior, but were believed by the authorities of Carondelet, and in that belief, and for that reason only, they executed the deed for the Jefferson Barracks tract under which the Government now holds.

Upon these facts, and upon the evidence from which they are deduced, I am of the opinion that the claimant should recover. It is not a case of overlapping boundaries which could have been adjusted and compromised by the parties; neither was there any adverse title or claim on the part of the Government upon which to base a compromise. The tract granted was a plot entirely within the common, and a tract which the Government has not professed to hold in its own right, nor under an adverse title, but always as a grantee under Carondelet. The grant of the common to Carondelet is simply evidenced by the surveys and their confirmation, but the grant itself goes back to and springs out of the act of 1812. The Secretary of the Interior had power neither to give nor to withhold a grant. His business was simply to ascertain what the

Government had granted in 1812, and then to furnish the party with legal evidence of his title thereto. Therefore the deed from the city to the Government, which is now the subject of dispute, stands in precisely the same plight which it would be if it had been given subsequently to the confirmation of the city title. The Government is in precisely the same plight as any other grantee of Carondelet who bought and took possession before the confirmation of the surveys. The question is simply whether a deed without consideration, executed in mistake of fact, or induced by duress or intimidation, shall stand and be binding upon the grantors. As to the power of this court to entertain a suit for trying such a question, the doubt which formerly existed is now removed by the act of Congress specifically conferring the necessary jurisdiction. Under it the court may look into the matter as a court of equity, and give relief by setting aside the deed or compelling the Government to pay the true consideration thereof.

43 In the Court of Claims.

THE CITY OF ST. LOUIS
vs.
THE UNITED STATES. } No. 1813.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the attys. for claimant for the allowance of an appeal, as filed in the clerk's office May 15, A. D. 1874, and of the order of the court May 15, 1874, allowing the same, of the finding of facts by the court and the conclusions of law thereon on which the majority of the court founded their judgment, of the opinion of the court, and of the dissenting opinion of Judge Nott.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this twelfth day of August, 1874.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 221. The City of St. Louis, appellant, vs. The United States. Court of Claims. Filed 12th August, 1874.

Supreme Court of the United States.

No. 221.—October Term, 1875.

THE CITY OF ST. LOUIS

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Brief of Montgomery Blair, for Plaintiff in Error.

Jos. L. Pearson, Printer, 9th and D streets, Washington, D. C.

Supreme Court of the United States.

No. 221.—October Term, 1875.

THE CITY OF ST. LOUIS
vs.
THE UNITED STATES.

Appeal from the Court of Claims.

Brief of Montgomery Blair, for Plaintiff in Error.

Statement.

The original petition was filed in 1859, the supplement in 1863, and the amended petition in 1866, in behalf of the City of Carondelet. That city having been merged in, and its rights transferred to, the City of St. Louis by law, the court, in 1874, ordered the suit to be carried on in the name of the City of St. Louis.—(p. 7.) The suit is for a tract of land known as the Jefferson Barracks tract, containing about 1,700 acres, claimed as part of the commons of Carondelet. It is not denied that the land in question is within these commons as confirmed by the act of 1812, as laid off by U. S. survey made prior to 1817, which was re-marked by a U. S. survey, "the field notes of which were returned to the surveyor-general's office, and the description and plat made out in form and approved by the surveyor-general" in 1834, and that no appeal was taken by either the government or the claimant, the parties to this selection of the land

confirmed, to the Commissioner of the General Land Office.—(Findings 7, 8, 13, and 15, pp. 10, 12, 13.)

1st. Title is claimed for the United States by reservation declared in 1855, by the Secretary of the Interior, to have been made by *implication* in the act of confirmation.

2d. By deed from Carondelet in 1854, the only consideration for which was the revocation by the Land Department of an illegal order which disturbed the commons title.

The Reservation.

The history of the connection of the United States with the tract in question is as follows: In 1826, before Carondelet was incorporated, on the application of the quartermaster at St. Louis, a few of the old inhabitants of Carondelet gave permission for the occupation of about 1,200 acres of this tract, in the form of a deed (p. 11) purporting to grant the land to the United States "so long as it may be found useful and necessary for military purposes." Under this deed the United States troops under command of Gen. Atkinson entered, during the year 1826, and erected Jefferson Barracks. Prior to that time there had never been any military post within the commons under this or any former government, and no entry of any military reserve there was made in the land records till 1855.—(p. 12.) But in 1839, after Carondelet had been incorporated, a controversy having arisen (p. 14) as to the validity of the temporary grant made by the individual inhabitants in 1826, the Secretary of War, although assured by Gen. Atkinson (p. 14) that he would have no difficulty in getting a confirmation by the corporate authorities of the original grant, if allowed to do so, determined, for some unexplained reason, to get the property in another manner, and for that purpose addressed a letter to the Commissioner of the General Land

Office (finding 16, p. 13) denying the title of Carondelet to any land whatever south of the river des Peres (see map x), requested the Commissioner to set off that portion of it, which would be designated as a military reservation when the Land Office was ready to sell, and to sell the balance as public land. In 1841 (findings 19, 21, pp. 15, 16, 17) the Commissioner decided, substantially as requested by the Secretary of War, that Carondelet had no *legal* title, and had only an *equitable claim* to 6,000 arpents requiring confirmation; and, in order to lay off the military reservation and enable Congress to provide for the claim of Carondelet, instructed the surveyor-general to reserve 7,700 acres of the land and lay off the balance for sale. This order was never executed. Subsequent decisions, made in the years 1845, 1846, and 1848, (findings 25, 26, 27, 28, pp. 17 and 18,) were held by Commissioner Butterfield, on 4th March, 1852, (finding 34, p. 20,) to have overruled Commissioner Whitcomb's order of 1841, and to have "settled that this office must not disturb or in any manner interfere with the aforesaid survey by Brown, unless Congress shall otherwise order by further legislation; but that said survey is subject to such adverse valid rights as may exist under confirmed private claims, and also to the right of the United States in the military reservation for Jefferson Barracks as had in virtue of law, and the right the United States possess under the treaty as the successor of Spain. I therefore regard this office, under existing law, as having no further power or control over the subject."

On the 15th of March, 1852, the House Committee on Public Lands, to which the subject had been referred, through Mr. Fitch, its chairman, (afterwards commissioner to settle land claims in California,) by report, (No. 122, 32d Congress, 1st session,) asked to be discharged from the further consideration of the subject, on the ground that "the question as to the *just limits of the tract of land confirmed as the commons of Carondelet* must be

decided by the *judicial* and not by the *legislative tribunals* of the country; and, in the judgment of the committee, * * * it would not be expedient at this time *to attempt to disregard the claims of the village of Carondelet to any portion of the land within the surveyed limits*, and, regarding it as unceded public domain, proceed to make sale of it. If in fact the whole be embraced within the grant of the commons, *the United States can now neither divest the village of its title nor convey the title to another.*"

On the 8th of June, 1852, the Commissioner decided that the survey of 1817, retraced in 1834, should be adhered to, subject to all valid private rights, and to the right of the United States to the military reservation.—(Finding 36, p. 20.)

On the 25th of February, 1853, the Secretary of the Interior overruled this decision and directed a new survey, limiting the commons to 6,000 arpents.—(Finding 37, p. 20.) This order was never executed, and no reply was given to the application of the surveyor-general, of 23d March, 1853, (p. 21,) for instructions how to execute it.

On the 23d of February, 1855, the Secretary of the Interior decided "that the survey of 1816 or 1817, as retraced by Joseph C. Brown in 1834, should be sustained, excluding, of course, the 1,702 acres heretofore set apart for the use of the military post of Jefferson Barracks."—(Finding 46, pp. 24 and 25.)*

How the Deed was Procured.

"Up to the year 1839 no controversy arose in regard to *Brown's survey, but the same was generally regarded as final*, and the town of Carondelet laid out and leased lands comprised within it."—(Finding 15, p. 13.) *But in consequence of the action of the land office in* 1841, *the title was un-*

* There had then been no such setting apart of this tract, except by a survey made under the direction of the military, but not furnished to the Land Department till after this decision.

settled, and the litigation ensued, and "in the year 1844 the Supreme Court of Missouri, in the case of Dent vs. Bingham, 8 Mo., 579, rendered a decision adverse to the title of Carondelet to commons as defined by the limits assigned therefor in Brown's survey."—(Finding 24, p. 19.)

"In 1839, and again in 1845, the authorities of the town of Carondelet caused the commons south of the River des Peres, which did not conflict with the Jefferson Barracks tract or with confirmed private claims, to be laid off in small tracts and leased; and the leases contained a clause that the towns would not be responsible in case of failure of title, and a large number of persons became lessees of said tracts, *and the action of the General Land Office in regard to Brown's survey caused a doubt in relation to the title of the lands so leased, greatly disturbing the lessees.* In 1854 an attorney of one of the lessees was active in urging upon the mayor and members of the city council of Carondelet that they should cede the Jefferson Barracks tract to the United States; and he represented to them that that was the only condition on which the confirmation of Brown's survey could be obtained; that that survey had been set aside in 1841, or thereabouts; that without a re-establishment of it Carondelet could not make out her title to the common; *that ever since that survey had been set aside, Carondelet had been in litigation with trespassers on the common; that Carondelet could never get a survey as long as the War Department opposed it, which it would do until Carondelet gave up the barracks tract*; but that as soon as Carondelet gave that up, and the Secretary of War was satisfied, the Secretary of the Interior was ready to give a survey. The said attorney had been to Washington City several times to obtain a confirmation of said survey, and he represented to said mayor and members of the city council that he had talked with the Secretary of War and the Secretary of the Interior, and knew their views perfectly; and that the former wanted the barracks tract for the War Department, and he would not let the latter approve the survey of the common until that tract was given up to the United States. In consequence of these representations, none of which appear to have been made by the authority or with the knowledge of any officer of the government of the United States, the city council of Carondelet passed the ordinance of June 27, 1854."

(This ordinance is set out in finding 40, p. 21, and Carondelet, in pursuance thereof, gave the deed dated 25th October, 1854, set out in finding 42, p. 22, to the United States of the barracks tract.)

"No money was paid by the United States to the city of Carondelet, as a consideration for the execution of the aforesaid deed of October 25, 1854, nor was any asked or expected."

A previous deed for the reservation was delivered to the Secretary of the Interior, which he transmitted to the Secretary of War on 28th February, 1854, with a letter saying: "As your decision as to the sufficiency of the deed for the full protection of the War Department in the tract in question (the Jefferson Barracks tract) may have a bearing upon a case now before this department, I have most respectfully to request that I may be advised of the result of your deliberation on the subject." The enclosed deed was referred by the Secretary of War to the Attorney-General, who, on the 9th October, 1854, recommended that, owing to defects therein, it should be accepted *de bene esse* and provisionally, and meanwhile another deed free from defects should be prepared and executed.—(Finding 41, p. 22.)

The required deed was accordingly executed and delivered to the Secretary of the Interior, who, on the 9th day of December, 1854, transmitted it to the Secretary of War, and the Secretary of War, on the 12th January, 1855, informed the Secretary of the Interior that the deed was satisfactory (finding 43, p. 23), and the Secretary of the Interior then approved Brown's survey, as hereinbefore stated.—(Finding 46, p, 24.)

Assignment of Error.

Upon the foregoing facts the Court of Claims found, as conclusions of law, p. 27—

(1.) That the Commissioner of the General Land Office and the Secretary of the Interior had lawful power to set

aside, in part or in whole, Brown's survey of the Carondelet commons, and did set it aside as to the Jefferson Barracks tract, which they adjudged to belong to the United States.

(2.) The deed made by the corporate authorities of Carondelet was made with the full knowledge of all the facts of the case, and of the previous decisions of the courts as to Carondelet's title, and for an advantage to Carondelet under the existing circumstances in the settlement of a doubtful title, which constituted a valuable consideration for said deed.

(3.) That the claimant is not entitled to recover.

These conclusions of law the plaintiff in error assigns for error.

Argument.

I. The first conclusion of law found by the Court of Claims involves *three* questions:

1. Whether the Land Department had power to set aside the survey?

2. Whether it did set it aside?

3. Whether it had power "to adjudge the Jefferson Barracks tract to the United States?"

(1.) In the discussion of the first question, the Court of Claims considers the survey of Elias Rector, made in 1816, or in 1817, and concludes that it ought to be disregarded, because Surveyor-General McCree discusses the location of the commons in a letter dated 21st April, 1829, without referring to this survey, and because it was not shown that William Rector, who was surveyor-general when the survey was made, or any of his successors, had approved it.

The letter of Surveyor-General McCree, to which the court refers, shows only that in a personal interview with Messrs Biddle & Ashley, he had refused to locate a New

Madrid claim for them within the *reputed* limits of the Carondelet commons, and that the documents which he had subsequently received from the recorder of land titles had confirmed him in the correctness of that decision. No inference can be drawn from this letter prejudicial to the Rector survey. Whilst it may be inferred from it that he decided without examining the records of his own office, and for that reason did not know of the existence of Rector's survey, it shows clearly that in his judgment the records furnished by the recorder required the survey to be made as Rector had made it; that the commons were not limited to the quantity of 6,000 arpents, but were confirmed according to the metes and bounds indicated by the indorsement of Gov. Trudeau upon Gamache's petition, were bounded west by a line running parallel to the Mississippi river and extending 150 arpents from the point on the river des Peres, which Soulard had reached in the process of making the survey under the Spanish grant. (p. 11.) A survey made in accordance with this decision of McCree could not have varied essentially from Rector's. Indeed, all uncertainty in the grant indicated by Trudeau, is removed by the beginning of the survey made by Soulard, which McCree and every surveyor-general since 1812 has adopted. That fixed the point on the river des Peres, from which the west line extended 150 arpents south and parallel to the Mississippi.

But the discussion of the question of how the survey ought to have been made, into which the Court of Claims enters so largely, can have no legitimate bearing on any question in this case. Since the cases of West vs. Cockran, 17 Howard, 403, and Willot vs. Sandford, 19 H., 79, it has been well settled that that is not a *judicial* question. *The only question here is, was Rector's survey within the meaning of the act of* 1812?

It does not appear affirmatively that William Rector, the surveyor-general, approved the survey made by his

deputy, Elias Rector. But it is well established that the present usage of the surveyor-general to indorse his approval formally on surveys, was not then, or for many years afterwards, in force; and in the absence of such usage such indorsement would not be required, for the law does not ordinarily require express approval of the act of a deputy to make it valid. Such approval is implied unless the contrary appears. And accordingly, by the 13th finding of the court, it appears that on the 10th of July, 1834, the surveyor-general, Langham, directed his deputy, Brown, to retrace Rector's survey for the purpose of connecting it with the adjoining public and private surveys. This is conclusive evidence that the Rector survey was complete. An order by the surveyor-general to retrace a survey to connect it with the public and private surveys assumes the authenticity and completeness of the survey, and is record evidence of the fact which the cases above cited hold to be conclusive on the judicial department of the government. And it was so accepted by the head of the Land Department. Under date of 23rd February, 1855, (p. 24,) the Secretary of the Interior says: "this [the Rector] survey was made in 1816 or 1817, *by the proper officer. When the act of* 1824 *was passed Carondelet commons was 'already' surveyed, and was not, therefore, affected by the act of* 1824." This court also passed on this precise point in the case of Carondelet vs. St. Louis, (1 Black., 190.) "It is objected," says the court "that the field notes of Rector's survey were not platted or recorded, and were found in an obscure box in the surveyor-general's office, and that in fact there *never was an approved survey.* Wm. Melburn, who was a clerk in the office as early as 1817, and had been surveyor-general, proves this objection groundless. * * It was established, as matter of fact and of law, that the survey had been made and the field notes duly returned, and that Brown remarked the lines in 1834. It also appeared, as matter of fact and of law, from the records of the General Land

Office, *by the decisions of the officers there, that the department administering the public lands had settled the question in regard to the regularity of Rector's survey, its due return and approval.*"

This survey is also affirmed in Dent vs. Emmeger, 14 Wall., 313, where this court holds, citing Menard vs. Massey, 5 H., 313, that "a survey made under the direction of the proper officer designated to have it made, and approved by him, was final and conclusive, unless an appeal was taken to the Commissioner of the General Land Office." There being no such appeal here, the court adds: "The survey made by Rector in 1817, retraced by Brown and approved by the surveyor-general, in 1834, is binding on the village and estops her from claiming any land beyond the town thus established.—(Carondelet vs. St. Louis, 1 Black, 179.) *And those lines must necessarily be of equal validity as regards those claiming against her.*" And the reason given for this in Menard vs. Massey is "that the claimant and the United States *were parties to the selection of the land;* for, as they agreed to the survey, (unless it was appealed from,) they are mutually bound and estopped by it." And it was because the United States was estopped that Cerré, claiming under the United States by title dated in 1836, and whose claim Dent asserted in the suit against Emmeger, was estopped. Dent's title having emanated after the title of Carondelet became complete by survey, which estopped the United States, it follows necessarily that Cerré was also estopped.

Hence the Court of Claims overrules a well settled and familiar principle, and two express decisions of this court with respect to this particular survey, when it concludes (p. 29) that "though the title of Carondelet to commons actually depended upon the making of an authentic survey, a period of *twenty-three* years elapsed after the passage of the act of 1812 before proper steps were taken by the proper officers to cause it to be made. They were taken only when Brown's survey was made in 1834. So

far as appears that was the *first legitimate and authorized attempt to ascertain and fix the limits of the commons.*"

The regularity of Rector's survey, as matter of fact and of law, having been settled by this court and by the decisions of the department administering the public lands, which this court held to be final, and also declared to be "the completion of the title," it certainly could not be lawful for the Commissioner of the General Land Office to set that survey aside in 1841, or afterwards, more than twenty-four years after it was made, especially when, by another act, that of 1831, 4 Stat., p. 435, passed, as the Secretary of the Interior says, "with a full knowledge of all that had been done," Congress had vested the inhabitants of Carondelet "with full property" in the commons, which their own officer had then ascertained by a regular survey, duly returned in accordance with law. But if it were allowable for the Court of Claims to overrule the Land Department and this court with respect to Rector's survey, it ought not to be allowed to overrule itself with respect to Brown's survey, which it concedes to have been "legitimate and authorized," and yet disregards. To justify the disregard of Rector's survey, the court feels it necessary to show that it was irregular, and then disregards Brown's survey whilst admitting it to be "legitimate and authorized," and approved, and not appealed from.

THE SURVEY NOT SET ASIDE—THE BARRACKS TRACT "ADJUDGED" TO THE U. S.

(2.) (3.) The Secretary of the Interior (p. 25) says: "In view of all the facts and circumstances of the case, and of the opinions expressed by the highest legal tribunals known to our law, I am impelled to the conclusion that, as the surveys of 1816 and 1834 were executed by competent authority, were duly approved, and were for a series of years acquiesced in by the inhabitants of Carondelet,

both the government of the United States and the inhabitants of Carondelet are estopped and concluded thereby." And this court, in Carondelet vs. St. Louis, (p. 191,) affirms this decision, saying: "The matter having been brought to the consideration of Secretary McClelland, he adjudged, and properly, that Rector's survey, and Brown's remarking of it, *concluded the government* and bound the corporation of Carondelet to the whole extent of it." Nothing is better settled, therefore, by the decision of this court, and of the Land Department itself, than that the Commissioner of the General Land Office and the Secretary of the Interior had not the power to set aside Rector's survey and Brown's remarking of it; and, hence, it was not set aside in law. And the idea that the Commissioner and Secretary of the Interior "did undertake to set it (the survey) aside" in fact, is a total misconception of the proceedings of those officers. The Secretary, in the language already quoted, disclaims all power in his department to set the survey aside, and an examination of the opinion will show that he did not intend to do so, in fact. He undertakes only, as the Court of Claims says, "to *adjudge* the barracks tract to belong to the United States."

Having decided (p. 25) that "the survey of 1816 or 1817, as retraced by Joseph C. Brown, in 1834, should be sustained," he adds the words "*excluding, of course, the* 1,702 *acres heretofore set apart and reserved for the military post at Jefferson Barracks*, and that the parties claiming adversely to Carondelet should not be hindered thereby from establishing their rights before the judicial tribunals of the country." By this language, it was not meant that the 1,702 acres shall be excluded from within the *limits* of the survey. This was a physical impossibility, as these limits extended beyond the tract on all sides. But the intention is that whilst the survey of the commons, which inclosed the tract in question on all sides, shall remain in all respects undisturbed,

that, nevertheless, it shall be excluded from the legal operation of the survey. And this meaning will be more clearly seen by attending to the reasoning upon which, as the Court of Claims properly describes it, the barracks tract was "*adjudged* to belong to the United States" by the Secretary.

Having stated (pp. 24, 25) that the title to the commons had been confirmed by the act of 1812; that Rector's survey was made by the officer designated by law in 1816 or 1817; that Brown had, in 1834, connected it with subsequent surveys, and had reported that he had easily found and identified Rector's lines and corners, the Secretary says: "Under this state of facts, the question appears to me to be, does the act of 1812, the operations had under the act, and the subsequent acts of 1824 and 1831, of themselves constitute a title in Carondelet *to the whole extent of the survey made by Rector* in 1817, and retraced by Brown in 1834? The Supreme Court of the United States, in Strother vs. Lucas, says 'a confirmation of a title by act of Congress not only renders it a legal title, but furnishes a higher evidence of that fact than any patent, inasmuch as it is a direct grant of the fee by the government itself; whereas, a patent is only the act of its ministerial officers.' And in the case of Mackey vs. Dillon, the same court says 'the act of Congress of 1812, confirming the claim to commons adjoining and belonging to the town of St. Louis, did not define the extent and boundaries of those claims, nor adopt the evidence laid before the board of commissioners for that purpose. The boundaries of the claims thus confirmed were designedly left open to the settlement of the respective claimants by litigation in the courts of justice, or otherwise.' The act of 1831 was passed with a full knowledge of all that had been done by Congress in the case, to wit, *the survey of Rector and the reservation of the Jefferson Barracks tract.* Such is the legal presumption, and it seems to me sound. *The reservation of the barracks,*

though not expressed, is implied, as in the case of Fort Saint Marks, Florida, (for which, see the case of Mitchell et al. vs. The United States, 15 Peters, pp. 52–92.) * * My decision, therefore, is that the survey of 1816 or 1817, as retraced by Joseph C. Brown in 1834, should be sustained; excluding, of course, the 1,702 acres heretofore set apart and reserved for the use of the post at Jefferson Barracks, and that the parties claiming adversely should not be hindered thereby from establishing their rights before the judicial tribunals."

The decision of the Secretary is, therefore, that the act of 1812, the operations under that act, and the subsequent acts of 1824 and 1831 vested the inhabitants with full property in the commons to the whole extent of the survey, *except as to the barracks tract*, which the Secretary says was then reserved, not expressly, *but by implication*, from the grant by the act. It is not, therefore, in virtue of any power in his office to make the reservation that he undertakes to exclude it from the operation of the survey, but he adjudges that the reservation had *already* been made by operation of law, and he cites the case of Mitchell et al. vs. The United States, 15 P., 52, as authority for this decision. Having expressly decided that the survey was beyond his control, and must stand, but that the law which had affirmed it had at the same time excluded from it the military reservation, his decision is that the survey of 1816, as retraced, should be sustained; excluding, of course, the military reservation which the law itself excepted from its operation.

And, accordingly, in executing the order, the surveyor-general makes no new survey for the commons, excluding the barracks tract, but returns the old one, and certifies (p. 26) that it "was originally executed about the year 1817, by Elias Rector, deputy-surveyor, * * and its lines subsequently retraced * * in 1834, by Joseph C. Brown. * * *The said survey, as retraced, was sanctioned by the decision of Hon. R. McClelland, 23d February, 1855;*

* * and pursuant to said decision, there is hereby made a distinct and unqualified exclusion from said survey No. 3,102, of survey No. 3,341, executed * * on 23d December, 1840, by George C. Waters, under instructions from the War Department, of the military reserve of Jefferson Barracks, as the absolute property of the United States."

But the act of 13th June, 1812, 2 Stat., p. 748, which made it the duty of the surveyor-general "to survey, or cause to be surveyed and marked, the out-boundary lines of the said several towns or villages, so as to include the out-lots, common-field lots, and commons thereto belonging," under which this survey was made, did not authorize the surveyor-general, or any supervising executive officer, to "adjudge" the question of title to any tract of land lying within the *out-boundaries* which he was required by the act to survey and mark. He had the same right to "adjudge" between Carondelet and the (other) parties claiming (land within the survey) adversely to Carondelet, which he refers to the courts, as he had to "adjudge" between Carondelet and the United States with respect to the barracks tract, which also lay within these out-boundaries. His authority extended only to the ascertainment of the *out-boundaries* of the lands designated in the law. On this point he is clear and emphatic that Rector's survey, as retraced by Brown, correctly locates them, and on this his decision is held by this court to be conclusive. But on the question whether any tract within these out-boundaries belonged to the United States or to any private individual, his judgment was merely nugatory.

Moreover, the history of the case shows that this was a false pretence, not thought of when the controversy was commenced, and admitted to be a sham when finally adopted by the other steps which were then taken to secure the title from the *recognized owner*. The Secretary of War began the contest by informing the Land Department that the land claimed as commons south of the

river des Peres was public land, and by requesting him to have it all surveyed and sold as such, except what would be *hereafter* designated for a military reservation. He admitted that there was no such military reservation as the Land Department afterward invented, and this fact is also stated in the 10th finding, (p. 12,) with the addition that there was no military post there till the United States troops entered under Carondelet in 1826, and no attempt to make a military reservation there at all till after this decision of the Secretary of the Interior in 1855. There was not only no military post at Jefferson Barracks prior to the grant of commons to Carondelet by the Spanish government, such as there was at Fort St. Marks, the existence of which the court held in *confirming the grant* in the case of Mitchell vs. The United States, in 7 and 15 Peters, authorized the court to reserve lands within 1,500 varas from the walls of the fort for military purposes, but if there had ever been a military post on the land, it belonged to the *confirming power* (exercised by the court with respect to Fort St. Marks) and not to the *surveyor* to make the reservation. Hence the Secretary of War only insisted that the land was public land, and that it might be surveyed as such with a view to the making of such a reservation at a future time.

And Commissioner Whitcomb yielded to the demand of Secretary Poinsett and gave orders to carry out his wishes. But the order was never executed. It expired with Mr. Poinsett's power, within six weeks after Whitcomb's order was made. But while the successors of Mr. Whitcomb in the land office refused to carry out the ex-Secretary's orders, and abandoned all idea of setting aside Rector's and Brown's survey, *they did not comprehend the effect of the survey upon the title*, but whilst maintaining the correctness of the survey, held the title to be still so incomplete as to admit of their withholding what was wanted for military purposes, and that Congress only could give Carondelet complete title to the remainder;

and this recommendation was accordingly made in 1846, (p. 17,) and again in 1852, (p. 20.) The House Committee on Public Lands, of which Judge Fitch was chairman, having rejected the doctrine upon which the pretention to hold the barracks tract then rested, holding that the grant needed no further confirmation, and that it was "inexpedient (for Congress) to attempt to disregard the claim of the village of Carondelet to any portion of the land within the surveyed limits," the Land Office then for the first time took shelter under Fort St. Marks, and decided (p. 20) that the title of Carondelet was complete to all the land save the barracks tract, which was reserved by operation of law, as in the case of Mitchell vs. The United States, 7 and 15 Peters. It was only after thirteen years of controversy, resulting in establishing the correctness of the survey, and the decision of the House Committee that the title to the land within it was complete, that the ingenious theory was started that the act of confirmation contained an implied reservation for a military post, which had no existence at the date of the act, and when the officer by whom the military possession had been taken, declared (p. 14) that "for possession we shall have to depend upon a cession of a part of the commons made by the authorities of Carondelet in 1826,"—the deed under which he entered, now admitted to be void.

But the record shows that the Secretary who adjudged this reservation to have been made by operation of law, had no faith in it himself, for before making it he had taken most extraordinary means to procure an absolute deed from Carondelet, and had sent it to the Secretary of War, saying (p. 22): "As your decision *as to the sufficiency of this deed* for the full protection of the interests of the War Department in the tract in question may have a bearing on a case before this department, I have most respectfully to request that I may be advised of the result of your deliberations." Here is a declaration that he would await the decision of the Secretary of War upon "the

sufficiency of *this deed* for the *full protection* of the interests of the War Department in the tract in question," and in effect an avowal that he looked to the deed for the *full protection of the government" in the tract in question*, and it was not until it was decided that the deed was sufficient *in itself* for the full protection of the government in the tract, by the Secretary of War and by the Attorney-General, that he decided the case before him. Nothing was said in communicating the deed to the Sectary of War or to the Attorney-General about any implied reservation of the tract from the grant to Carondelet. The Attorney-General certifies to the sufficiency of the deed, and thus recognizes the title to be in Carondelet alone, and the whole transaction demonstrates that all of these officers relied upon the deed alone for the title to the land.

II. This brings us to the consideration of the second finding of law by the Court of Claims, which declares that deed to be valid, because it "was made by Carondelet, with full knowledge of all the facts of the case, and of the decisions of the courts as to Carondelet's title, *and for an advantage to Carondelet under the existing circumstances in the settlement of a doubtful title, which constituted a valuable consideration.*"

This concedes that the only consideration for the deed was "the settlement of a doubtful title," and holds that an agreement between Carondelet and a public officer, that the decision which had rendered doubtful the title to the commons generally should be revoked by him, was a legal consideration for a conveyance to the United States.

The 15th finding (p. 13) states that "up to the year 1839 no controversy arose in regard to Brown's survey, but the same was generally regarded as final, and the town of Carondelet laid out and leased lands confirmed within it."

To obtain title to the barracks tract the Secretary of War, in June, 1839, (p. 13,) requested the Commissioner of the General Land Office to declare all the commons south of the village to be public land. When this was done, and "when the action of the Commissioner became known," says the court, (p. 30,) "but more especially after the decision of the Supreme Court of Missouri in 1844 (in Dent vs. Bingham, 8 Mo., 579) adverse to the title of Carondelet as defined and limited by Brown's survey, the lessees were greatly disturbed, and without doubt endeavored to influence the authorities of Carondelet to take some action which would settle the dispute about the survey favorably to the title;" and the court then proceeds to state (p. 31) the several offers of Carondelet to procure the reaffirmance of the survey in the years 1851, 1852, and 1854—first, of a deed for the land, with a reversionary clause when the government ceased to use it for military purposes; and, when that offer failed to effect the settlement, of the deed in fee, which was accepted, and which the court finds was made upon the representations of the agent of Carondelet in Washington to the authorities of Carondelet (p. 23) "that he had talked with the Secretary of War and with the Secretary of the Interior, and that the former wanted the barracks tract, and he would not let the latter approve the survey of the commons until that tract was given up to the United States." The finding adds that these representations do not "appear to have been made by the authority or with the knowledge of any officer of the government of the United States." But this is not material. The finding of law under consideration, in assuming that the deed was the result of that negotiation, and that its consideration was *the settlement* of the title of Carondelet to the remaining land of the commons affected by the decision of the Secretary of the Interior on the 23d February, 1855, concedes that these representations were true in substance and effect, and were verified by the result.

Nor does the decision of the court turn upon the failure of the proof as to this point. But, whilst finding that the title of Carondelet was generally recognized as complete when it was disturbed in 1841 by the Land Department, and that the disturbance was such as to oblige Carondelet to give the deed required as the condition upon which that department consented to compose "the protracted controversy" in 1855 by its decision of that date, the court holds this not to have been an illegal exaction or restraint, because, as it contends that the department had the legal power to make the order which disturbed the title in 1841, it could legally require the deed in 1855 as the condition or consideration upon which it would settle the doubt or disturbance it had caused.

This shows that the second finding of law, like the first, depends on the power of the Land Department over the survey, which has been considered above. But a further answer will here be given in considering the authority cited by the court.

To maintain the power of the Commissioner the court cites the case of Castro vs. Hendricks, 23 H., 438, declaring that the Commissioner "exercised a supervision and control over subordinate officers charged with making surveys." This is not denied. But is this supervision wholly unregulated? Is there no limit in time, or condition upon its exercise? so that a Commissioner can in 1841 abrogate a survey made in 1816, retraced and connected with subsequent adjoining surveys in 1834, the lands subdivided, leased, &c., *and no appeal taken*, which of itself, speaking of this survey, in 14 Wall., at p. 313, this court said, made it "*final and conclusive.*" The Court of Claims rejects this and says, p. 32: "Carondelet would not wait till they (the boundaries) were officially and definitely settled, but proceeded to subdivide and lease lands with boundaries which had never been finally sanctioned by the proper authorities." This assumes that

some action on the part of the Commissioner was required by law to complete the survey. But the law itself shows that no action by the Commissioner was contemplated, for, although the act of 1812 made it the duty of the Surveyor-General to forward copies of the plat to the Commissioner, and to the recorder of land titles, which will be presumed to have been done, as the record shows nothing to the contrary, the law required no action upon them either by the Commissioner or by the recorder. It was *the survey* which this court, in 1 Black, Carondelet vs. St. Louis, p. 189, held "*was the completion of the title*," and which, with the law, the court declared, in Les Bois vs. Brammell, 4 H., p. 464, "made and located the (commons) title as effectually as a patent would have done;" and Chouteau vs. Eckhart, 2 H., p. 344, is to the same effect. Even where a patent was required to complete the title, the court held, in the case of Lindsay vs. Hawes, 2 Black, 557, that the Commissioner could not, in an *ex-parte* proceeding, set aside a survey so as to affect the incipient title. By a recent decision of the Circuit Court of the United States for the District of California, decided in the case of Theodore Leroy vs. Tobias Jameson and others, Mr. Justice Field presiding, it is held that a title, when completed by patent, is beyond the Commissioner's power the moment the patent is recorded. Can it then be admitted that a survey which completed the grant to Carondelet, as effectually as a patent would have done, may be set aside by the Commissioner twenty-five years after that survey was duly made, this court itself having declared that "it appeared as matter of fact and of law, from the records of the General Land Office, by the decisions of the officers there, that the department administering the public lands had settled the regularity of Rector's survey by its due return and approval?"

The case of Castro vs. Hendricks related to a confirmation under the act of 1851, which declared that "a patent shall issue to the claimant upon his presenting to the

General Land Office an authentic certificate of such confirmation and a plat of the survey of the land duly certified and affirmed by the Surveyor-General of California." On the application of the claimant to the Commissioner for a patent under this provision, the Commissioner decided that the location shown by the plat did not conform to the decree of confirmation, and for that reason refused to issue the patent; and the court held this to be within his discretion.

The Commissioner was in that case by law the judge of whether title ought to be completed by patent on the plat presented. Carondelet needed no patent and asked for none. The title to the commons had been complete for twenty-five years, and required no action by the Commissioner to complete it. This is expressly decided by the Secretary of the Interior when he says "the survey was made in 1816 or 1817 by the proper officer," and "was 'already' surveyed when the act of 1824 was passed," and quotes Strother vs. Lucas, saying a confirmation by Congress was higher evidence of a legal title than any patent as applicable to the commons title as thus surveyed. This decision itself pronounces the order it revokes to be illegal. Nor had the original survey, or the retracing of it, which had stood for seven years, been objected to or appealed from, and it was regarded on all hands as final.—(Finding 15.)

If the Land Office had power to set aside the survey, its restoration was not a valid consideration for the deed, because—

First. The Secretary shows that this restoration was due to Carondelet as of right, and his decision proceeds on that ground only; and,

Second. No law authorized the Secretary to restore the survey in consideration of the deed, or upon any other terms of compromise.

In the case of Cunningham vs. Ashley, 14 H., 377, the court held such a settlement by executive officers to be

void, saying: "The officers of the government are the agents of the law. They cannot act beyond its provisions *nor make compromises* not sanctioned by it." And this language is quoted and approved in Lindsay vs. Hawes, 2 Black, 558. But while the Secretary was prohibited by law from making his decision in consideration of the deed of Carondelet, and did in fact make his decision, when it was made, on the legal and proper grounds stated in the decision itself, the evidence shows that he obtained the deed by withholding this decision until the deed had been delivered, and referred to the Secretary of War for his decision upon "its sufficiency for the full protection of the interests of the War Department in the tract in question," with the avowal that he would await that decision because it may have a bearing upon his own decision respecting the survey; and the evidence also shows that several deeds were proffered, and it was not until a deed in fee was tendered, and was pronounced satisfactory by the Secretary of War and the Attorney-General, that the Secretary of the Interior gave his decision.

The Court of Claims upholds this deed only upon the ground that the consideration of it was "*the settlement of a doubtful title.*" It is not pretended that there was any other consideration, or that the deed is valid if the circumstances of the case do not show it to have been made for the consideration of "the settlement of a doubtful title"—in other words, a legitimate compromise between conflicting claimants. But "an agreement made on the footing of a compromise of a right as doubtful cannot be supported in favor of the party who knew at the time that it had no existence."—(3 Leading Cases in Eq., 410.) Now, by the findings of fact, it appears the Secretary of the Interior knew and declared at the time the deed was given that Carondelet's title to the commons was *not a doubtful title.* His opinion is explicit. Nor did "the previous decisions" to which the finding refers make the title doubtful, because among the "existing circumstances" which

it properly makes the test of the transaction, was the fact shown on the face of the opinion that the point on which the adverse decision turned had been overruled by later and more authoritative decisions. Nor had Carondelet had any doubt about her title. From first to last she maintained that her title was a complete legal title. The transaction was, then, in no sense "the settlement of a doubtful title." This language applies only when both parties are in doubt and when there is room for doubt, by reason of the decision being in the power of some umpire between them, and certainly not when both agree that the title belongs exclusively to one party, whilst the power to decide rests exclusively with the other. No proposition could be more obvious than that the relations of such parties do not admit of compromises or bargains of any kind between them.

The language and reasoning of the court applies only to parties having an umpire over them in the courts. The books abound in decisions showing that compromises can take place between private individuals only when the parties are on *equal* terms. See Adams' Eq., 183; 2 Kent, 483; note "d" ib., p. 246, as to advantages secured through contracts by persons holding fiduciary relations; also 1 Parsons' Contracts, 5 ed., p. 86; 2 Rob. La. Rep., 556; Florence vs. Adams, 27 N. Y.; Olcott vs. R. R. Co., p. 565; Thompson vs. Havelock, 1 Camp., 527; 3 Camp., 43; Michand vs. Girod, 4 Howard, 503–52; Bartholomew vs. Leach, 7 Watts, 473; Conger vs. Ring, 11 Barbour, 356–63; Story's Eq., § 322–323; § 315.)

The nearest approach to this case to be found is the case of Wheeler vs. Smith, 9 H., 55, where the compromise between devisees and the heir-at-law, by which the estate was applied to public objects, was set aside. The devisees were not culpable. They had no fraudulent intent or personal interest, but the parties were not on equal terms, the necessities of the heir-at-law being great,

&c. The public object and pure motives of the devisees, and the $25,000 received by the heir, were held insufficient to sustain the transaction. But this case is far stronger. Carondelet got nothing for what she conveyed, and had no alternative but to convey. Her tenants had been unable to defend their possessions, and whilst all the reasoning upon which the adverse decisions rested had been overruled, the survey was not formally restored, the title remained disturbed, and the law afforded no means of compelling its affirmance; and, although the Secretary admits by his decision that Carondelet was entitled to that affirmance as of right, he withheld it till the deed was delivered.

Both of the law propositions of the Court of Claims depend upon the legal power of the Land Department to set aside the survey. In the *first*, it is only by virtue of this power that the legality of the reservation is claimed at all. And it is equally necessary to the second, for the only consideration claimed for the deed which that proposition upholds, is the revocation of the order to set aside the survey. If that was an illegal order, its revocation could not form a valid consideration for a conveyance.

Now, the question as to the power of the department to set aside the survey is not an open question. The case of Carondelet vs. St. Louis, a case which has since been repeatedly affirmed by this court, turned upon this precise question, and the court then held "that Rector's survey and Brown's remarking of it *concluded the government, and bound the corporation of Carondelet to the whole extent of the survey;*" and the reason why the court held both parties to be bound is, that "it was established as matter of fact that the survey had been made and the field notes duly returned, and that Brown remarked the lines in 1834. It also appeared as matter of fact and of law, from the records of the General Land Office, by the de-

cisions of the officers there, that the department administering the public lands had settled *the regularity of Rector's survey, its due return and approval.* And the jury having found that the corporation of Carondelet had in various modes recognized, accepted, and held under Rector's survey, as identified by Brown in 1834, we are of the opinion that the state court properly rejected the claim."—(1 Black, p. 191.)

This decision is affirmed in the case of Dent vs. Emmeger, 14 Wall., 308. The question there is exactly the same now presented, viz: whether the survey was ever set aside, and the evidence to prove it is the same presented here, viz: "the documents relating to the surveys of Rector and Brown."—(p. 314.) Dent claimed under a confirmation of 1836, and in order to get rid of the commons title, offered these documents to show that the survey had been set aside. The circuit court excluded the documents, and this court affirmed that decision, saying, "as the right of the village, according to the judgment of this court in *Carondelet vs. St. Louis*, had been fixed by the survey of Brown in 1834, which was conclusive as regards all adverse individual claims, the testimony was clearly irrelevant and incompetent, and was properly rejected. The acts of 1812 and 1836 were inapplicable to the United States, and did not affect their rights." The court here applies the estoppel declared in *Carondelet vs. St. Louis* to adverse *individual* claims only, and adds that the acts of 1812 and 1836 were inapplicable to the United States. But there was no question before the court calling for this distinction, and it is not sustained by the case cited, for there it is expressly declared that the government was itself bound by the survey, and it is inconsistent with a previous part of the decision in 14 Wall., which quotes Menard vs. Massey, 8 H., 313, establishing the conclusiveness of this survey *against the government.* The same principle is also asserted in Guitard vs. Stoddard, 16 H., 512.

The sum of which is that both parties were bound, because one—the United States—had made and approved the survey, and the other—the village—had accepted it. And the Court of Claims itself asserts the same principle (at p. 28) and only *omits* to apply it, as all the facts are found by it. The court says: "By the 1st section of the act of 1812 (2 Stat., 748) the claim of that village to commons was confirmed in general terms, without any designation of boundaries or quantity, both of which were by the act required to be ascertained by an official survey, upon the completion of which, *and its approval* by the United States, the title would be complete without any further act on the part of Carondelet or the United States." As the "due return and approval" of the survey asserted by this court is also distinctly found by the Court of Claims, (13th finding, p. 12,) that court was bound on its own reasoning, to have held the title of Carondelet to be *complete.*

In the case of Carondelet vs. St. Louis, Carondelet lost a large tract of land now within the city of St. Louis, of as great value, probably, as the tract here in question, although the proof showed conclusively that it ought to have been embraced in the survey, because the court held that the acceptance of the survey had concluded both the government and Carondelet. Besides that the decision expressly holds the government to be concluded equally with Carondelet, it is manifest it could not conclude Carondelet unless it also concluded the government, the other party to the survey. And the conclusiveness of the survey was the point, and the only point, ruled in the case. And its conclusiveness upon both parties was fixed by the acceptance of the survey by Carondelet by acts antecedent to 1839, and, therefore, before the proceding in the Land Office in 1841, taken at the request of Poinsett, and under which alone title is claimed here for the govern-

ment. Hence there is no escape from the reversal of the decision of the Court of Claims in this case, except by the reversal of the case of Carondelet vs. St. Louis, and the series of decisions by this court which that case has governed.

Nor would this court make a rule which deprives Carondelet of her land on the north, and revoke it to deprive her of her land on the south, because her corporate authorities may have refused to recognize the invalid deed of 1826, if it considered only what fair and sound dealing required.

The facts found in the record show that this controversy did not originate in any such refusal. It was persisted in by the Secretary of War, notwithstanding he was assured by General Atkinson that there would be no difficulty in procuring the ratification of that deed by the authorities.—(p. 14.) And the court can take judicial notice of the fact that if that deed had been ratified the land would have reverted long ago, St. Louis having long since ceased to be a western frontier town, and the troops for which the post was then needed being now posted thousands of miles beyond the Mississippi.

The villagers no longer find a market for their truck at the barracks, which was the sole consideration for their grant of the place as quarters for the troops.

In the case of Carondelet vs. St. Louis (p. 188) this language occurs: "The act of 1812 granted to the inhabitants of the place known as Carondelet their lands used in common for pasturing. But the power was reserved by Congress to the executive authority to survey the common property by including it in an out-boundary survey, *reserving from the common property such portion as the government saw proper to withhold for military purposes, which was done.*"

This language relates to no point raised or ruled in that case. There is no provision in the act which will bear such a construction, and it is not relied on by the Court of Claims to support the decision in this case.

The only expressions in the act of 1812 bearing on the question of military reservations are found in the second section of the act, (2 Stat., 748,) and limits the power of reservation to *vacant town or village lots, out lots, and common-field lots.*

The language is: "That all town or village lots, out lots, or common-field lots included in such survey (the out boundary), which are not rightfully owned or claimed by any private individual or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be, and the same are hereby, reserved for the support of schools," &c.

As the land in question here is neither a town or village lot, out lot, or common-field lot, it never was subject to reservation under this clause of the act, and never was claimed under it. Moreover, by the 2d section of the act of 1824 (4 Stat., p. 52) the time for making military reservations from the vacant town lots, &c., expired on 26th November, 1825.

The *commons* having been already confirmed as private property by the act of 1812, were not subject to be appriated to public uses. In United States vs. Fitzgerald, (15 Peters, 420,) the court says: "No reservation or appropriation of the lands made after the right of the defendant accrued under the act of 1834, could repeal that right." That was a case where the defendant had proved up and paid for a pre-emption right, but no patent had issued. Here it is not pretended that there was any attempt to make the reservation until the act of 1812, and the official and approved survey under it had "*made and located the commons title as effectually as a patent could have done.*"

Summary.

(1.) The survey of the commons of Carondelet by Rector in 1816 or in 1817, as retraced by Brown in 1834, was the completion of the title and gave Carondelet an indefeasible estate therein.

(2.) The order of the Secretary of the Interior, of 1855, "*adjudging*" 1,702 acres of said commons to belong to the United States as a military reservation, was illegal and void.

(3.) The order of Commissioner Whitcomb of 1841, directing the surveyor-general to reserve 7,700 acres of said commons to enable Congress to satisfy the *equitable* claim of Carondelet for commons, and to enable him to set off 1,700 acres for a military reservation, and to sectionize the balance for sale as public land, was illegal and void.

(4.) The revocation of said order, and thereby settling the disturbance it had caused to the title of the commons, did not constitute a valid or sufficient consideration for the deed given by Carondelet in 1854 to procure said revocation, and said deed ought to be declared inoperative and void.

MONTGOMERY BLAIR,
For Plaintiff in Error.

March, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

THE CITY OF SAINT LOUIS, APPELLANT,
vs.
THE UNITED STATES.
No. 221.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

THE CITY OF SAINT LOUIS, APPELLANT,
vs.
THE UNITED STATES. } No. 221.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

This is an action (see act of 1873, ch. 313, 17 Stat., 621) brought in the Court of Claims in 1859 to recover, *ex aequo et bono*, the value of the land on which Jefferson Barracks, near Saint Louis, is located, being about 1,702 acres, worth some $400 per acre.

The facts upon which the claim is based are as follows: Under the Spanish and French dominion, in 1803 and before, the village of Carondelet, now a part of Saint Louis, set up a claim to *commons* adjoining, which to some extent was recognized by the then authorities. After the cession of Louisiana, when preferring its claim, in 1808, before the commission appointed by the United States to settle such matters, the village alleged it to be for 6,000 arpents, (*i. e.*, 5,104 acres.) That claim was rejected by the commission, but in 1812 Congress con-

firmed it. In 1817 a survey was made of it by a deputy surveyor, and such survey filed in the office of the surveyor-general of Missouri. In 1834 the lines of the former survey were, by order of the surveyor-general of Missouri, retraced by another deputy. These lines contained 9,905 acres.

In the mean time, in 1826, certain of the citizens of Carondelet had, for a nominal consideration, conveyed the land in question, being a part of that within the lines of the above surveys, to the United States, to be held *so long as necessary for military purposes*, and then to revert to the vendors. In the same year Jefferson Barracks was established thereupon.

In 1839, so far as appears, the Commissioner of the Land-Office was for the first time apprised of the survey of the Carondelet commons. On the 22d of June, in that year, the Secretary of War (Poinsett) wrote to Commissioner Whitcomb, asking him to take steps to sell the tract so surveyed, as part of the public lands, the claim by Carondelet being regarded by him as wrongful; and he added that whenever the Land-Office should be prepared to sell the residue of the tract, "the military reservation desired for the United States around the fort at Jefferson Barracks will be designated."

This matter having been submitted to the Solicitor of the Land-Office, he gave an opinion that the survey included several thousand acres to which Carondelet had no title, and advised a re-survey, and a sale of all land not included in the lines so established. In this the Commissioner concurred. In April, 1840, the surveyor-general communicated to the Commissioner a plat of the commons, and advised the establishment of a certain

line, designated thereon, as one that would practically give effect to the claim of the village as presented in 1808. Upon a reference of this to the then Solicitor of the Land-Office, it was approved, and in November, 1840, was communicated to the commanding officer at Jefferson Barracks, with instructions to have the 1,702 acres laid off for military purposes, and due return made to the War Department. In January, 1841, this opinion was also communicated to the surveyor-general at Saint Louis, with instructions to represent on his records that the 1,702 acres were reserved as suggested by the Solicitor; and also to have the balance of the unappropriated land in the 9,905-acre tract surveyed as public lands, &c. This survey was not made. In September, 1845, Commissioner Shields declined to direct the above order for a survey to be executed, until further action by Congress. In February, 1846, the Commissioner again declined to order such survey, and expressed the opinion that the right of Carondelet to the whole commons, as surveyed in 1834, *reserving Jefferson Barracks*, should be confirmed by Congress.

In August, 1848, Commissioner Young ordered certain *entries* that had been made within the survey of 1834 to be canceled, leaving for decision by Congress the extent of the grant for commons. In November, 1851, the city council of Carondelet directed an agent to proceed to Washington, to procure from Congress a confirmation of the commons according to the survey of 1834; and during the next winter passed an ordinance directing that an absolute deed of conveyance of the Jefferson Barracks tract should be made to the United States. In January, 1852, the above ordinance was amended so as to make the conveyance conditional *dur-*

ing its occupation for military purposes. In March, 1852, Commissioner Butterfield gave an opinion that the order of Commissioner Whitcomb in 1841 had been virtually overruled by the subsequent orders of Commissioners Shields, Young, &c., and that the survey of 1834 designated the lands to be reserved to satisfy the Carondelet claim for commons, *subject to the military reservation, &c.*

In June, 1852, Acting Commissioner Wilson decided that the survey of 1817, retraced in 1834, should be adhered to *under the stipulations specified in the Commissioner's report of March* 4, 1852. Upon appeal to the Secretary of the Interior, (Stuart,) the latter, in January, 1853, ordered that a resurvey should be made of the lands within the survey of 1834, giving to Carondelet only the 6,000 arpents originally claimed by it. In June, 1854, the city council of Carondelet ordered that a quit-claim deed of the Jefferson Barracks tract should be made to the United States. This was done, for a nominal consideration, upon the 25th of October, 1854.

In February, 1855, in reply to a communication from the Commissioner (dated March, 1853) asking what disposition should be made of the lands that might be detached by a *new survey* [referring to that ordered by Secretary Stuart, in January, 1853] from the tracts included in the survey of 1834, the Secretary of the Interior (McClelland) ordered that the survey of 1834 should be sustained, *excluding the* 1,702 *acres reserved for the fort at Jefferson Barracks.* Thereupon a survey was made of the commons, showing the lines of the barracks tract; and in October, 1855, the same was approved by the surveyor-general, with "*a distinct and unqualified exclusion from the said survey*" *of the* 1,702 *acres of the military reserve, &c.*

The result was, that after deducting the barracks and certain private confirmed claims, Carondelet received as commons about 6,050 acres, instead of the 5,104 originally claimed.

Looking at the case, then, in the light of justice alone, divested of all technicalities, it appears that the parties who are urging this claim have already received about 1,000 *acres more than they were originally entitled to, i. e.,* 1,000 *acres more than the United States were under any obligation of justice to convey.*

Upon the other hand, if technicalities may be resorted to, it appears that, as their title to the tract, the United States have a valid deed in fee-simple, executed by the claimants.

In regard to the consideration of the deed, nothing appears to countervail a suggestion that the city of Carondelet, finding, in 1854, *that, by the survey of* 1834, *it had acquired a technical interest in some* 2,700 *acres of land more than it had just claim to, considered it prudent to silence all question as to such rights, as well as to its title to commons at all, by dividing such surplus with the United States, (the questioner) surrendering to the latter all right to dispute the deed of* 1826, *and releasing, also, the very contingent reversion therein reserved, in consideration of an acknowledgment of its right to commons, including* 1,000 *acres of surplus.*

In speaking of the quantity of land *beyond what Carondelet had just claim to* as being only 2,700 acres, I take into consideration the circumstance that, by adverse title in private persons, that city in the end lost about 2,100 acres of the 9,905-acre tract. (Record, p. 27.)

If the title of Carondelet to the surplus beyond 6,000

arpents were merely technical, depending upon the manner in which the words of a statute had operated upon the laches of certain subordinate officers of the United States, its action, in waiving the technicalities and discharging the United States from the consequences of such laches, cannot be undone. There is no tribunal having power to *set up* technical defenses once abandoned, or to restore a condition of things in which the efforts of public justice to administer *æquum et bonum* are obstructed by positive provisions of law, or by ill-advised action or inaction of parties. It is a piece of elementary information that all the tendencies in the administration of law are to the contrary; *i. e.*, to avoid the force of mere technicalities and other things obstructing natural justice.

Granting, then, that the effect of the act of 1812 upon the surveys of 1817 and 1834 was as claimed by the learned counsel for Saint Louis, and that it invested Carondelet with title to the 9,905 acres lying within those surveys, would a release by that village to the United States of the 4,800 acres therein, *in excess of its just claim* as defined by itself in 1808, have presented any feature to justify equity in decreeing the *cancellation* of that release, or to warrant the relessor in claiming subsequently that the relessees *should pay for the land so released?* If, as seems plain, it would not, could any additional equity be imported into the case by showing that the relessor was in some degree quickened to make the conveyance by finding that certain high officials of the United States, when called upon, incidentally or otherwise, to recognize its title to the whole tract, refused to do so, and suggested that it was invalid, and sometimes even threatened to take steps to

have it set aside? It one has done an act (*not merely void*) which in conscience was proper to be done, will courts scrutinize the *actual* motives of the party in order to relieve him from its effects, or nicely inquire whether he did it upon collateral or less worthy considerations that turned out to be unfounded, or because of certain potent influences, with which he thought it inconvenient to contend?

And in this connection, when *duress* is imputed because of relations occupied to a transaction, having the general features of this, *by officials of the United States*, may it not well be replied that the apprehension so excited comes strictly within that *suspicio cujuslibet vani et meticulosi hominis* to which the law pays no respect? (Blackstone, 1, 131.)

If Secretaries Poinsett and Stuart and Commissioner Whitcomb had any public duty to perform in reference to the survey of 1834, they were bound to do it according *to their honest and considerate views of that duty*, and the effect of such action upon the resolutions of the inhabitants of Carondelet was not *duress* or *coercion*. And, whether what they did was in the course of official duty or otherwise, no citizen and, *a fortiori*, no community of citizens, of the United States, having the remedies of mandamus and the like at hand, to be administered by an independent judiciary, can set up any pretense of intimidation or compulsion under circumstances like the present.

I repeat, however, in the language of Story, that to warrant equitable interposition, even in cases where force has been applied to the actor, or where he has acted under circumstances of extreme necessity and

distress, short of direct restraint or duress, there must have been, *also*, an element of *oppression*, *imposition*, or *fraudulent advantage* in the transaction itself. (Equity, 1, sec. 240.) I am not speaking of a case where the force, &c., applied is *such as to render the act void*, as such a case is not in point here. Therefore, as Carondelet has, in the present case, done no more than it was highly proper for it to do, *i. e.*, disclaimed *some part* of the advantage which it had acquired from the errors of the deputy surveyor in 1817, as confirmed by the negligence of persons about the office of the surveyor-general of Missouri, charged with the public interests herein, there is no ground of relief in the case.

Something more, however, may be suggested in reply to the clear and vigorous argument that has been submitted for the claimant, inasmuch as it does not seem necessary to admit that Carondelet had a good title to the barracks tract at the time of the execution of the deed of 1854.

In this connection, it should be remarked that the controversy which arose in 1839 (Record, p. 13) before the Commissioner of the Land-Office, involving the survey of 1834, which, with varying fortunes, continued until 1855, *ending* in favor of Carondelet, was specifically as to the sale of the lands within that survey not included in the barracks tract. It was the survey and sale as public lands of the land excluded from the barracks tract, or, at least, of wha was excluded from that tract *and* the 6,000 arpents originally claimed by Carondelet, that the Commissioner and Secretaries discussed and decided.

It may be that their action upon this point is of no

importance; but whether so or not, it is plain that those who favored the survey of 1834 gave their decisions expressly reserving the rights of the United States to the barracks tract. If those decisions are cited for the claimant, they must be cited *cum onere*, which amounts to this: that it was held, *as against parties wishing to make entries upon the tract outside of the barracks*, that the survey of 1834 was valid, *saving always to the United States a title to so much as lay inside thereof.*

It seems that suggestions like those commencing upon the eleventh page of the brief for the claimant cannot avail to deprive this series of decisions of a feature like that under consideration, which probably had much to do with the acquiescence of the United States in the extravagant allowance of land received by the city.

Laying aside these decisions, therefore, as without effect *in favor* of the claimant, the question comes up as to the condition of its title at the time (1839) when the controversy above mentioned arose.

At that time its title to *commons*, &c., rested upon the act of 1812, as carried into effect by the surveys of 1817 and 1834.

I submit that the survey of 1834 was neither ordered nor made *cum animo probandi*, if I may use such an expression. The surveyor at that time took up the old survey of 1816, with the purpose of connecting it with the surveys of the public lands, but did not intend, or affect, to pass upon the propriety of that transaction in connection with the act of 1812. The survey of 1834, therefore, lacks the necessary quality of an approval by the surveyor-general to give it effect under the act of 1812. He neither approved nor disapproved of it. His

mind was not upon that subject His order to the deputy concerned the old lines of 1816 so far as they bore upon *exterior* tracts, not *interior*. He took for granted their operation upon what was *within*. If, however, any action upon his part were necessary to give effect to that survey, it is submitted that the resurvey was not intended or then understood to give it; and, therefore, that to attribute such an effect is inadmissible.

The survey of 1817 is liable to a similar objection. It was never *approved*.

In Carondelet *vs.* Saint Louis (1 Black., 179) parol evidence of such approval seems to have been given, (p. 191.) There was no such fact established in the present case; and its establishment in a case heretofore reported can have no effect here. (Mackay *vs.* Easton, 19 Wall., 619.)

Therefore, although, as to all the purposes which were important in Carondelet *vs.* Saint Louis, and the subsequent case of Dent *vs.* Emmeger, (14 Wall., 308,) (cited and relied upon by the learned counsel for Saint Louis,) the action of the claimant, and also of the United States, is bound by those surveys, because of subsequent acquiescence by the United States; yet, for matters to which that acquiescence did not apply, it is submitted that those cases are no authority. They rely upon the effect of *all that was uniformly done and omitted by the United States from* 1817 *to* 1854. There is no such uniformity as to the matter now in hand, or, if there be, none that favors the case of the claimants. The United States are bound by a long course of action to admit that there are *no public lands subject to entry* within the lines of 1817 and 1834. But as to a military reservation there the question is, for all that appears in the cases cited, open.

Such seems, in fact, to be the purpose of the considerate language with which this court closes its opinion in Dent *vs.* Emmeger,—language, the bearing of which here is thoroughly appreciated by the learned counsel for Saint Louis. (Brief, p. 26.)

The language of the deed of 1826, (Record, p. 11,) may also be cited to show that the inhabitants of Carondelet did not at that time rely upon the survey of 1817. What the United States then asked for, and what they gave, was a mere quitclaim to a tract described by bounds, and identified further only as "part of a *large quantity* which the said parties of the first part claim as common," &c. Here is no reference to the survey of 1817, as would have been natural if it had been known to, or relied upon by, either party. The vendors speak of their right as being still a mere "claim." In the course of the same deed it is added that "the right and title to the premises herein described is not finally decided upon," &c., language inconsistent with that *assertion* of title which the law justly expects from every person called upon to deal thereabouts with strangers. It seems (Record, p. 13) that, at this time, the higher officers of the United States did not know of the survey of 1817; and this *quasi* concealment of title by the claimant at a time when it was called upon to assert it is (under the later circumstances of the case) inconsistent with any title to the relief now demanded.

When speaking of *concealment* I must be understood as dealing with a suggestion that the inhabitants of Carondelet have always, since 1817, relied upon the survey made in that year. If, however, in 1826 the existence of that survey was not known either to those inhabitants or to the United States, such circumstance

seems not less significant as to its validity and authority.

It seems clear that the doubts as to its title, which were expressed by Carondelet, whether in making leases (Record, p. 23) or in its later dealing with the United States, did not *originate*, as is suggested by the claimant, (brief, p. 23, &c.,) in the hostile dealing of Secretary Poinsett and his colleagues and successors.

So long as the survey of 1817 was unknown, it was a matter of course that the title should be regarded as doubtful; and after it became known that under a claim for about 5,000 acres, the inhabitants of Carondelet had acquired nearly 10,000 acres, it may be that the *news* was looked upon as *too good to be true.* The names of "the parties of the first part" to the deed of 1826 show that a large proportion of the inhabitants of Carondelet even then consisted of descendants of the innocent old French and Spanish settlers, and these probably intended to abide by the original claim for 6,000 arpents.

Upon the whole it is submitted:

I. That in October, 1854, at the date of the deed by the claimant to the United States, the title of the former to the Barracks tract (or the reversion therein) was not only honestly *doubted* by both parties to that deed, but, as matter of fact, was really *doubtful.*

II. That there is nothing in the original relation between the claimant and the United States as to the land now known as the Barracks tract, or in anything that has happened subsequently, to justify the former in claiming to be paid therefor.

I may add, what I hope is unnecessary, that if the

claimant is entitled to anything, it can be only to the value of the *reversion* reserved in the deed of 1826, which, in reason, must be very little indeed. For unless the claimant ratify that deed, the United States, at the bringing of this suit, had been in *adverse possession* of the land (for a qualified estate) during thirty-three years; whilst, if the claimant does ratify it, it seems that the above conclusion as to the measure of *damages* cannot be resisted.

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Solicitor General.